Environmental Commissioner of Ontario

2004·2005 Annual Report

Supplement

Planning Our Landscape

TABLE OF CONTENTS

ABBREVIATIONS vii

PREFACE: INTRODUCTION TO THE SUPPLEMENT ix

SECTION 1: ECO REVIEW OF UNPOSTED DECISIONS 1
  Ministry of Natural Resources (MNR) – Policies 1
    The Attawapiskat River: "Proposed Candidate Waterway Provincial Park" vs. Mining Claims 1
    Furbearer Management Guidelines 2
    Provincial Wildlife Population Monitoring Program 3
    Endangering the Protection of Species at Risk in Ontario Parks 4
    Opening Ontario's Parks to Hunting of Eastern Wolf 5
    Wind Power Development on Crown Land 6
    Free Use Policy for Public Lands 7
    Update: Statements of Conservation Interest for Conservation Reserves 8
  Ministry of the Environment (MOE) – Policies 9
    Ontario's Environmental Leaders Program 9
    Deloro Mine Site Cleanup 10
  Ministry of Energy (ENG) – Policies 11
    Energy Efficiency and Conservation Policies 11
  Ministry of Agriculture and Food (OMAF) – Policy 12
    Ethanol Targets for Ontario's Gasoline 12
  Management Board Secretariat (MBS) – Policy 13
    Energy Conservation in Government Operations 13

SECTION 2: ECO REVIEWS OF INFORMATION NOTICES 15
  Management Board Secretariat (MBS) – Policy 15
    MBS/ORC Class Environmental Assessment Invitations to Participate 15
    Electricity Conservation in Ontario Government Operations 16
  Ministry of Municipal Affairs and Housing (MAH) – Policy 17
    Government Signs Exchange Agreement for a Park on the Oak Ridges Moraine 17
  Ministry of Municipal Affairs and Housing (MAH) – Regulations 17
    Minister's Zoning Orders 17
    Regulation(s) to Authorize Exemptions under the *Greenbelt Protection Act, 2004* 17
  Ministry of Municipal Affairs (MAH) – Instruments 18
    Oak Ridges Moraine Conservation Plan Conformity Amendments 18
  Ministry of Natural Resources (MNR) – Policies 18
    Rabies Research and Control Operations for 2004 19
    Redesignation of a Portion of the Attawapiskat River 19
    Bear Wise Telephone Response Line and Agreement with Police Services 19
    Development of a Biodiversity Strategy for Ontario 20
    Identification of Wild Turkey Capture and Release Locations in Ontario for Winter 2005 20
    Provincial Wildlife Population Monitoring Program Plan 21
    2005 Prescribed Burns 21

- Our Sustainable Future, MNR Strategic Directions 22
- Boreal Mixedwood Notes 22
- Wind Power Development on Crown Land 23

Ministry of Natural Resources (MNR) – Regulations 23

- Changes to the Ontario Fishery Regulations under the federal *Fisheries Act* 23

Ministry of Natural Resources (MNR) – Instruments 24

- Water Management Plans (WMP) 24
- Approvals of the Disposition of Land by Conservation Authorities 25
- Cage Culture Aquaculture Licences under the *Fish and Wildlife Conservation Act* 25
- Class A Licence to Remove More Than 20,000 Tonnes of Aggregate Annually from a Quarry 26

Ministry of Northern Development and Mines (MNDM) – Instruments 26

- Amendments to Certified Closure Plans 26
- Restart of the Northern Empire Mill 27

Ministry of the Environment (MOE) – Act 27

- Ministry of Public Infrastructure Renewal's Bill 136 – *Places to Grow Act, 2004* 27

Ministry of the Environment (MOE) – Policies 28

- Amendment to a Guideline for O. Reg. 127/01 under the *Environmental Protection Act* 28
- Recent Activities Related to Air Standards 28
- Ontario's Clean Air Action Plan 29
- Ministry of Public Infrastructure Renewal's Places to Grow Initiative 29
- Framework for a Land Disposal Restriction Regulation for Ontario 30
- Final Discussion Document of the Industrial Pollution Action Team 31
- Review of the National Pollutant Release Inventory 31
- Improvements to Ontario's Environmental Assessment Process 31
- Smaller Drinking Water Systems: Advisory Council Report 32
- Canada-wide Standard: Dioxin and Furan Emissions from Conical Municipal Waste Combustors 32
- Source Water Protection: Reports of the Technical Experts and Implementation Committees 33
- Drive Clean Emissions Analysis Reports 33
- Update on Ontario's Environmental Leaders Program 34
- Waste Electronic and Electrical Equipment: Minister's Request for Waste Diversion Program...... 34
- Report of the Experts Panel on Sound-Sorb 35

Ministry of the Environment (MOE) – Regulations 35

- Administrative Fees for Applications for Permits to Take Water 35

Ministry of the Environment (MOE) – Instruments 36

- Certificate of Approval for the Proposed Construction of a Sewage Collection System 36
- Deloro Mine Site Arsenic Remediation 37
- Re-instatement of Provisional Certificate of Approval for a Waste Disposal Site 37

Ministry of Transportation (MTO) – Policy 38

- Environmental Management for the Ministry of Transportation – Overview 38
- Environmental Assessment Terms of Reference 38

Ministry of Health and Long-Term Care (MOHLTC) – Policy 39

- West Nile Virus – Preparedness and Prevention Plans for 2003, 2004 and 2005 39

Environmental Commissioner of Ontario (ECO) – Policy 40

- Discussion Paper for the 10-Year Review of the *Environmental Bill of Rights* 40

SECTION 3: ECO REVIEWS OF EXCEPTION NOTICES 41

Ministry of the Environment (MOE) – Regulations 41

- Designation of Parts of the Territorial District of Algoma under the *Aggregate Resources Act* 41

- Ministry of the Environment (MOE) – Instruments ... 42
  - Storage of Paper Fibre Wastes near a Wetland ... 42
  - Storage of Deadstock at a Rendering Plant ... 42
  - Storage of Leaking Drums ... 43
  - Use of a Diesel-powered Tire Shredder ... 44
  - Short-term Approval for the Management of a Municipality's Waste ... 45
  - Fire at a Waste Site ... 45
- Ministry of the Environment (MOE) – Regulation ... 46
  - Amendments to the Taking and Use of Water Regulation (O. Reg. 434/03) under the *Ontario Water Resources Act* ... 46
- Ministry of Natural Resources (MNR) – Regulation ... 46
  - Establishing/Modifying Parks, Conservation Reserves, Nature Reserves under Ontario's Living Legacy Land Use Strategy ... 46

SECTION 4: ECO REVIEWS OF SELECT DECISIONS ON POLICIES, ACTS, REGULATIONS AND INSTRUMENTS ... 48

- MINISTRY OF ENERGY ... 48
  - Bill 100 (*Electricity Restructuring Act, 2004*) ... 48
- MINISTRY OF THE ENVIRONMENT ... 59
  - Bill 49 - *Adams Mine Lake Act* ... 59
  - Cedarwell Excavating Ltd.: Permit to Take Water ... 62
  - Approval of the Certificate of Approval for the Edwards Landfill Site ... 66
  - Pre-treatment of Hazardous Waste: Development of Regulatory Framework ... 71
  - Protocols for Updating Certificates of Approval ... 81
  - Records of Site Condition (Ontario Regulation 153/04) ... 85
  - Amendments to the Water Taking and Transfer Regulation ... 96
  - Aggregate Extraction on the North Shore of Lake Superior ... 105
- MINISTRY OF MUNICIPAL AFFAIRS AND HOUSING ... 117
  - *Greenbelt Act, 2005* and Greenbelt Plan ... 117
  - Provincial Policy Statement ... 136
  - Bill 26, *Strong Communities (Planning Amendment) Act, 2004* ... 152
- MINISTRY OF NATURAL RESOURCES ... 161
  - Aquaculture Policies and Procedures ... 161
  - Amendment of Regulations under the *Fish and Wildlife Conservation Act, 1997* to Enhance Wolf Conservation ... 173
  - MNR's Provincial Wood Supply Strategy ... 178
  - Wind Power Development on Crown Land ... 185
  - Amendments to the Forest Management Planning Manual ... 191
  - Forest Fire Management Strategy for Ontario ... 198
  - Prohibition on Buying and Selling Live Invasive Carps, Snakeheads and Gobies ... 209
- MINISTRY OF TRANSPORTATION ... 214
  - Environmental Protection Requirements for Transportation Projects ... 214

SECTION 5: ECO REVIEWS OF APPLICATIONS FOR REVIEW ... 221

- MINISTRY OF THE ENVIRONMENT ... 221
  - Classification of Chromium-Containing Materials as Hazardous Waste ... 221
  - Review of Public Notice and Signage Rules under Ontario's *Pesticides Act* ... 221
  - Review of Policies for Landfill Leachate Treated at Sewage Treatment Plants ... 225

Aquaculture in Georgian Bay – Water Quality and Environmental Monitoring 232
Review of the Need to Prescribe the Ministry of Transportation under Part IV (Applications for Review) of the *EBR* 241
Wood Wastes as Designated Wastes under the *Waste Diversion Act* 242
Waste Asphalt Roofing Shingles and Waste Industrial Roofing as Designated Wastes under the *Waste Diversion Act* 242
Prescribing the Ministry of Education under the *EBR* 243
Review of the Provisional Certificate of Approval – Egremont Landfill Site 244
Kitchener Street Landfill Certificate of Approval 248
Combined Sewer Overflows and Beach Closures 248
Review of Reg. 347 and *EPA* in Relation to Septic Haulage 254
Review of the Certificate of Approval for Sewage Works for King City 254
Review of the Need to Prescribe the Ministry of Transportation under Part IV (Applications for Review) of the *EBR* 258
Review of Provisional C of A Issued to Sheldrick Sanitation Ltd. 259
MINISTRY OF MUNICIPAL AFFAIRS AND HOUSING 260
Review of Prescription of the *Oak Ridges Moraine Conservation Act* under the *EBR* 260
Planning Act and Mineral Aggregate Extraction 262
Review of the Provincial Policy Statement 263
MINISTRY OF NATURAL RESOURCES 265
Review of the Managed Forest Tax Incentive Program 265
Review of the *Conservation Authorities Act* and Regulation 170, R.R.O. 1990 269
Review of the Provincial Policy Statement 271
Review of the Amendment to the Management Strategy for Double-crested Cormorants at Presqu'ile Provincial Park 272
Ontario Wild Turkey Management 278
Endangered Species Act and Regulation 328 280
Review of the *Aggregate Resources Act* Part VI and Ontario Regulation 244/97 285
Motorized Off-Road Vehicle Events on Crown Land under the Free Use Policy 286
Rehabilitation of Ontario Pits and Quarries 286

SECTION 6: ECO REVIEWS OF APPLICATIONS FOR INVESTIGATION 288
MINISTRY OF THE ENVIRONMENT 288
Alleged Contraventions of the *Environmental Protection Act* and the *Waste Management Act* 288
Alleged Contraventions of the *EPA*, *OWRA* and *EAA* by McNabb Drain Development 290
Alleged *Environmental Protection Act* Contravention by a Sauna Owner 295
Alleged *EPA* and *OWRA* Contraventions at Orillia's Kitchener St. Landfill 298
Alleged Contraventions of the Certificate of Approval for Sewage Works for King City 300
Alleged Contravention of Provisional C of A by Sheldrick Sanitation Ltd. 302
Alleged Contravention under the *EPA*: Installation and Operation of Wind Turbine 307
Alleged *OWRA*, *EPA* and *EAA* Contraventions by Snow Valley Ski Resort through Road and Sewage System Construction 310
MINISTRY OF NATURAL RESOURCES 315
Alleged Contravention of the *Fisheries Act* 315
Alleged Contraventions of *LRIA* and *Fisheries Act* by McNabb Drain Development 315
Alleged Contravention of *Conservation Authorities Act* s. 20(1) and O. Reg. 170 by a Conservation Authority 318

SECTION 7: *EBR* LEAVE TO APPEAL APPLICATIONS **319**

SECTION 8: *EBR* COURT ACTIONS **333**

SECTION 9: STATUS OF ECO REQUESTS TO PRESCRIBE NEW LAWS, REGULATIONS AND INSTRUMENTS UNDER THE *EBR* **337**

SECTION 10: UNDECIDED PROPOSALS **343**

ABBREVIATIONS

Terms & Titles

ANSI Area of Natural and Scientific Interest
APMA Automotive Parts Manufacturers' Assoc.
CA Conservation Authority
C of A Certificate of Approval
CanWEA Canadian Wind Energy Association
CCME Canadian Council of Ministers of the Environment
CCPA Canadian Chemical Producers' Association
CECO Chief Energy Conservation Officer
CFIA Canadian Food Inspection Agency
Class EA Class Environmental Assessment
COA Canada Ontario Agreement Respecting the Great Lakes Basin Ecosystem
CO_2e Carbon Dioxide Equivalent
COSEWIC Committee on the Status of Endangered Wildlife in Canada
COSSARO Committee on the Status of Species At Risk in Ontario
CPAWS Canadian Parks and Wilderness Society
CWG Compliance Working Group (Fisheries Act)
CWS Canada-wide Standard
DFO Department of Fisheries & Oceans (federal)
ECO Environmental Commissioner of Ontario
EFCO Electricity Finance Corporation of Ontario
ENG Ministry of Energy
EPR Environmental Protection Requirements
ERT Environmental Review Tribunal
ESA Environmental Site Assessment
FMP Forest Management Plan
FMPM Forest Management Planning Manual
GBP Greenbelt Plan
GHGs Greenhouse Gases
GRCA Grand River Conservation Authority
GWhr Gigawatt-Hour (1,000,000,000 watt-hours)
GWP Global Warming Potential
HALT Haldimand Against Landfill Transfers
IC&I Industrial, Commercial & Institutional (waste)
IESO Independent Electricity System Operator
IFAPP Independent Forest Audit Process and Protocol
IMO Independent Electricity Market Operator
LDR Land Disposal Restrictions
LEED Leadership in Energy and Environmental Design
MAH Municipal Affairs and Housing
MBS Management Board Secretariat
MF Management Forest
MFTIP Managed Forest Tax Incentive Program
MGS Ministry of Government Services
MISA Municipal Industrial Strategy for Abatement
MNDM Ministry of Northern Development and Mines
MNR Ministry of Natural Resources
MOE Ministry of the Environment
MOF Ministry of Finance
MPAC Municipal Property Assessment Corporation
MSP Market Surveillance Panel
Mt Million Tonnes
MTO Ministry of Transportation
NEC Niagara Escarpment Commission
NHS Natural Heritage System
NPRI National Pollutant Release Inventory
NVCA Nottawasaga Valley Conservation Authority
OEB Ontario Energy Board
OMAF Ontario Ministry of Agriculture and Food
OMB Ontario Municipal Board
OFA Ontario Federation of Agriculture
OFA Ontario Forestry Association
OFIA Ontario Forest Industries Association
OPA Official Plan Amendment
OPA Ontario Power Authority
OPAC Ontario Pesticides Advisory Committee
OPG Ontario Power Generation Incorporated
ORC Ontario Realty Corporation
ORMCP Oak Ridges Moraine Conservation Plan
OTS Ontario Tire Stewardship
PC Protected Countryside
PIR Ministry of Public Infrastructure Renewal
PLC Public Liaison Committee
PMRA Pest Management Regulatory Agency (federal)
PPS Provincial Policy Statement
ProFac SNC-Lavalin ProFac Incorporated
PSW Provincially Significant Wetland
PTEs Person-Tire Equivalents
PTTW Permit to take water
PWPMP Provincial Wildlife Population Monitoring Program
PWQO Provincial Water Quality Objectives
RA Risk Assessment
RET Renewable Energy Tariff
RFP Request for Proposals
RPS Renewable Portfolio Standard
RSC Record of Site Condition
RSCR Record of Site Condition Regulation
SARO Species At Risk in Ontario
SCI Statement of Conservation Interest
SEV Statement of Environmental Values
STDPP Scrap Tire Diversion Program Plan
STP Sewage Treatment Plant
TP Total Phosphorus
TSSA Technical Standards and Safety Authority
US EPA United States Environmental Protection Agency
UTRCA Upper Thames River Conservation Authority
VOCs Volatile Organic Compounds
WDO Waste Diversion Ontario
WNv West Nile virus

ABBREVIATIONS (Continued)

Legislation
AMLA *Adams Mine Lake Act*
ARA *Aggregate Resources Act*
BSLAA *Brownfield Statute Law Amendment Act*
CAA *Conservation Authorities Act*
CEPA *Canadian Environmental Protection Act*
CFSA *Crown Forest Sustainability Act*
DADA *Dead Animal Disposal Act*
EAA *Environmental Assessment Act*
EBR *Environmental Bill of Rights*
EPA *Environmental Protection Act*
ERA *Electricity Restructuring Act*
ESA *Endangered Species Act*
FFPPA *Farming and Food Production Protection Act*
FIPPA *Freedom of Information and Protection of Privacy Act*
FSQA *Food Safety and Quality Act*
FWCA *Fish and Wildlife Conservation Act*
GBA *Greenbelt Act*
KHSSPA *Kawartha Highlands Signature Site Parks Act*
LRIA *Lakes and Rivers Improvement Act*
MBCA *Migratory Birds Convention Act (federal)*
NEPDA *Niagara Escarpment Planning and Development Act*
NMA *Nutrient Management Act*
OEBA *Ontario Energy Board Act*
ORMCA *Oak Ridges Moraine Conservation Act*
OWRA *Ontario Water Resources Act*
PA *Planning Act*
PGA *Places to Grow Act*
POA *Provincial Offences Act*
SCA *Strong Communities Act*
SDWA *Safe Drinking Water Act*
SWSSA *Sustainable Water and Sewage Systems Act*
WDA *Waste Diversion Act*

PREFACE: INTRODUCTION TO THE SUPPLEMENT

Welcome to the Supplement to the Environmental Commissioner of Ontario's 2004/2005 annual report. This year's Supplement consists of 10 sections. It addresses the reporting year of April 1, 2004 to March 31, 2005. The following summary contains highlights of each section and discusses the role of the Environmental Commissioner of Ontario (ECO) in reporting this information to the public.

Section 1 – Unposted Decisions

Under the *Environmental Bill of Rights* (*EBR*), prescribed ministries are required to post notices for environmentally significant proposals on the Environmental Registry for public comment. Once a ministry has made a decision on how it will proceed, it must update the proposal notice with a decision notice. When it comes to the attention of the ECO that a ministry subject to the *EBR* has made an environmentally significant decision without first posting a proposal on the Registry, we review that decision and make inquiries to the ministry to determine whether the public's participation rights have been respected. Section 1 of this Supplement presents the ECO's findings. While the ECO monitors decision-making in all prescribed ministries, in 2004/2005 we made inquiries on specific decisions made by the Ministries of Natural Resources, Environment, Energy, Agriculture and Food, and Management Board Secretariat. Thirteen policy decisions, summarized in this section, were singled out by the ECO as unposted decisions.

Section 2 – Ministries' Use of Information Notices

Significant differences exist between the requirements ministries must meet for regular proposal notices posted on the Environmental Registry under sections 15, 16 or 22 of the *EBR* and information notices created under section 6 of the *EBR*. When regular proposal notices are posted on the Registry, a ministry is required to consider public comment and post a decision notice explaining the effect of the comments on the ministry's decision. The ministry is also obligated to consider its Statement of Environmental Values in its decision-making. This process is far superior to the posting of an information notice on the Registry, and provides greater public accountability and transparency. However, in cases where provincial ministries are not required to post a regular proposal notice, they can still provide a public service by posting an information notice. These notices keep Ontario's residents informed of important environmental developments.

As presented in this section, seven ministries posted information notices during the 2004/2005 reporting year. The ECO's review found that while some of these postings constituted acceptable and even commendable uses of information notices, sharing important information with the public, many others were unacceptable and should have been posted as regular proposal notices for full public consultation. This year the ECO also posted one information notice, related to the 10-year review of the *Environmental Bill of Rights*.

Section 3 – Ministries' Use of Exception Notices

Under the *EBR*, there are limited circumstances in which ministries may proceed with an environmentally significant decision and then inform the public through an "exception notice," instead of following the normal process of posting a proposal notice for prior public notification and consultation. Exception notices may be used in cases of emergency, or when another equivalent public participation process was or will be employed instead. In 2004/2005, both the Ministry of the Environment and the Ministry of Natural Resources made use of exception notices. Section 3 provides a summary of each exception notice, and the ECO's assessment of whether the use of the exception provisions was appropriate.

Section 4 – Decision Reviews

Each year the ECO reviews a sampling of the environmentally significant decisions made by ministries prescribed under the *EBR*. During the 2004/2005 reporting year, more than 1,800 decision notices were posted on the Environmental Registry, most of them for site-specific permits or approvals. Whether the ECO conducts a detailed review on a ministry decision depends on the decision's environmental significance and on the public's interest in the decision. Section 4 of this report consists of detailed reviews undertaken by the ECO for 20 selected decisions by five ministries:

- *Ministry of Energy*: launching changes to Ontario's electricity sector under the *Electricity Restructuring Act, 2004*.
- *Ministry of the Environment*: prohibiting the proposed Adams Mine landfill; issuing a permit to take water to Cedarwell Excavating Ltd. in Hanover; changing a certificate of approval to allow the Edwards Landfill to accept industrial, commercial and institutional waste from across Ontario; developing new rules for hazardous waste disposal; publishing the ministry's protocols for updating Cs of A for sewage works, drinking-water systems, air emissions and waste management; issuing a Records of Site Condition Regulation for brownfield site assessment, clean-up and reporting; passing a new Water Taking and Transfer Regulation to govern issuance of permits to take water; and deciding not to designate a proposed quarry, located on the "Great Lakes Heritage Coast" shoreline of Lake Superior, under the *Environmental Assessment Act*.
- *Ministry of Municipal Affairs and Housing*: releasing the Greenbelt Plan and the *Greenbelt Act, 2005* with new protections for southern Ontario agricultural lands; issuing a new Provincial Policy Statement on land use planning; and amending the *Planning Act* by passing the *Strong Communities (Planning Amendment) Act, 2004*.
- *Ministry of Natural Resources*: releasing new policies and procedures governing aquaculture operations; taking some new steps to conserve Ontario's gray wolves and eastern wolves; publishing a new Provincial Wood Supply Strategy; issuing a new policy and procedure to encourage wind power development on Crown land; amending the manual that guides forest management on Crown lands; issuing a Forest Fire Management Strategy; and banning the sale of live carps, snakeheads and gobies that are invasive species.
- *Ministry of Transportation*: releasing a summary of environmental protection requirements for transportation projects.

Sections 5 & 6 – Application Reviews

Under the *EBR*, Ontario residents can file "applications for review," asking government ministries to review an existing policy, law, regulation or instrument if they feel the environment is not being protected, or to review the need for a new law, regulation or policy. The public can also make "applications for investigation," asking ministries to investigate alleged contraventions of environmental laws, regulations and instruments. The ECO reviews applications for completeness, and forwards them to the appropriate ministry.

Each reporting year the ECO reviews and reports on the handling and disposition of applications by ministries. New applications made in 2004/2005 are briefly summarized, while we provide a more detailed review of applications on which the ministry has made a decision during the reporting year. Section 5 provides a summary and review of applications for review, while Section 6 addresses applications for investigation. In the 2004/2005 reporting year, the ECO had numerous applications to the Ministry of the Environment and the Ministry of Natural Resources to report on, as well as a few applications for review to the Ministry of Municipal Affairs and Housing.

Section 7 – *EBR* Leave to Appeal Applications

For certain instruments, Ontario residents have 15 days to seek leave to appeal a decision after it is posted on the Environmental Registry. The ECO posts notice on the Registry of these leave to appeal applications, and updates a notice once the appropriate appeal tribunal has made its decision. This section provides a summary of the 11 leave to appeal applications under the *EBR* that were received within the 2004/2005 reporting year.

Section 8 – *EBR* Court Actions

Under section 84 of the *EBR*, residents of Ontario have the right to bring a legal action against someone who is violating or is about to violate an environmental Act, regulation or instrument, and is harming, or about to harm, a public resource. In addition, anyone who suffers, or who may suffer, a direct economic loss or personal injury as a result of a public nuisance that caused harm to the environment may bring a legal action under section 103 of the *EBR*. The ECO is responsible for posting notices of court actions on the Registry for information purposes only. This section provides a summary of the two court actions that took place during the 2004/2005 reporting year.

There were no whistle-blower complaints under the *EBR* during the reporting year.

Section 9 – Status of ECO Requests to Prescribe New Laws, Regulations and Instruments under the *EBR*

The ECO constantly tracks legal and policy developments at the prescribed ministries and in the Ontario government as a whole, and encourages ministries to update the *EBR* regulations to include new laws and prescribe new government initiatives that are environmentally significant. Section 9 discusses the process for prescribing new laws, regulations and instruments, and provides a summary table to illustrate the current status of various recent Acts and regulations. As indicated in the table, there have been serious delays in making certain laws subject to the *EBR*.

Section 10 – Undecided Proposals

As required under section 58(c) of the *EBR*, the ECO reports annually on all proposals posted on the Environmental Registry within the reporting year that have not had a decision notice posted by March 31 of that year. This section provides a summary of the number of undecided policy, Act, regulation and instrument proposals by prescribed ministries.

SECTION 1

ECO REVIEWS OF UNPOSTED DECISIONS

SECTION 1: ECO REVIEW OF UNPOSTED DECISIONS

Public participation in environmental decision-making is at the heart of the *Environmental Bill of Rights* (*EBR*). Under sections 15, 16 and 22 of the *EBR*, prescribed ministries are required to post notices of environmentally significant proposals for policies, Acts, regulations and instruments on the Environmental Registry. These notices are to be posted for public comment for a minimum of 30 days before a decision is made on the proposal. The ministry must also consider all relevant comments received through public consultation, post a decision notice on the Registry to notify the public when a proposal is implemented, and explain the effect of public comments on the decision.

When it comes to the attention of the Environmental Commissioner of Ontario (ECO) that a ministry subject to the *EBR* has made an environmentally significant decision without first posting a proposal on the Registry, we review that decision to determine whether the public's participation rights have been respected.

Such inquiries can lead to one of several outcomes. The ministry may provide the ECO with legitimate reasons for not posting the decision on the Registry. For example, the decision may not be environmentally significant, or it may fall within one of the exceptions allowed by the *EBR*. In other cases, if the ministry has not yet implemented the decision, it may agree to post a notice on the Registry and allow public input. Finally, in certain cases, the ministry may choose not to rectify the situation, because the decision has already been made, because they do not regard the decision as environmentally significant, or perhaps for other reasons. In such cases, the ECO believes that the ministry has not adhered to the requirements of the *Environmental Bill of Rights* and has deprived the Ontario public of notification and comment rights.

While the ECO monitors decision-making in all prescribed ministries, in 2004/2005 we made inquiries on specific decisions by the Ministries of Natural Resources, Environment, Energy, Agriculture and Food, and Management Board Secretariat. Thirteen policy decisions, summarized below, were singled out by the ECO as unposted decisions. Each summary provides information on the decision, explains the ministry's response to the ECO's inquiry, and discusses whether this response was adequate under the *EBR*. In one case, MOE's site cleanup plan for the Deloro mine, the ECO was pleased that the ministry agreed to post a proposal notice. In many of the other cases discussed, the ECO continues to disagree with a ministry's failure to abide by *EBR* requirements to post a proposal on the Registry.

Ministry of Natural Resources (MNR) – Policies

The Attawapiskat River: "Proposed Candidate Waterway Provincial Park" vs. Mining Claims

Description

- In 1979, a 223-kilometre stretch of the Attawapiskat River, which flows from Attawapiskat Lake east to James Bay, was given protection from mining through a "mining withdrawal order." This was to protect the area while MNR decided whether to designate it as a provincial park.
- The parks planning process stalled in the mid-1980s, and because the government never fully documented the protection order on government maps, prospectors began to stake mining claims along the river. MNR did not notice the situation until 2004.
- MNR announced in April 2004, in an information notice on the Registry, that it would remove the "proposed candidate waterway provincial park" designation from a 33-kilometre section of the river to allow mining. The remaining 190 kilometres would continue to be subject to interim

protection, although with "some flexibility" to allow infrastructure construction related both to a planned diamond mine and to servicing the community of Attawapiskat. The information notice implied that federal and provincial environmental assessments associated with the proposed diamond mine would affect future plans for the remaining protected area.

- The ECO wrote to the ministry in May 2004, noting that this was an environmentally significant policy change. ECO encouraged MNR to re-post to the Registry the change in land use policy for the 33-kilometre stretch of the Attawapiskat River, this time as a policy proposal to allow public comment.

Ministry Rationale

- In its information notice, MNR explained its decision to allow mining by noting that prospectors staked their mining claims in good faith, and had already carried out extensive exploration. The information notice also indicated that the protection of the remaining 190 kilometres of mining-protected river was interim. Future planning, consultation and environmental assessment activities were cited, but no timeline was given for these activities.
- In response to the ECO, MNR asserted that removing the "proposed candidate waterway park" designation from a portion of the river was not a policy proposal and could not be re-posted for comment on the Registry, since Cabinet had already issued an Order in Council under the *Mining Act* to validate the existing mining claims and leases on that stretch of the river.

ECO Comment

- Removal of the designation of "proposed candidate waterway park" and of the related protections is an environmentally significant policy decision. MNR, as a prescribed ministry, is therefore required under the *EBR* to post such land use designation changes as Registry proposals for public consultation.
- The Ministry of Northern Development and Mines (MNDM), a prescribed ministry, oversees application of the *Mining Act*. Mining claims (the right to prospect) are not prescribed instruments, and only some forms of mining leases (the right to mine) are prescribed under the *EBR* and require posting to the Registry for public consultation. MNDM has pointed out to the ECO that the ministry does not have discretion when issuing mining leases under Section 81 of the Mining Act: the holder of a mining claim is entitled to a lease of the claim in order to conduct preliminary exploration work. Section 81 mining leases are not prescribed instruments under the *EBR*. The case of the Attawapiskat River highlights the environmental significance of mining claims and the importance of excluding such claims from protected areas.
- It is disappointing that MNR failed to coordinate with MNDM to ensure public consultation on its approach to solving a problem of conflicting mining and conservation claims – a problem that in this case was created and then exacerbated by the failure of the two ministries to communicate and coordinate on the "mining withdrawal order" either initially in 1979, or during the 25 subsequent years.
- The ECO is also concerned that relying on federal and provincial environmental assessments related to the planned diamond mine may not afford appropriate environmental protection or sufficient opportunity and scope for public comment on the future of the remaining protected area along the Attawapiskat River.

For more information on the disentanglement of mining and protected areas, refer to pages 168-169 of this year's annual report.

Furbearer Management Guidelines

Description

- Through an MNR response to ECO inquiries about how trapping quotas are set for lynx, it came to the ECO's attention in 2004 that MNR had drafted Furbearer Management Guidelines, which had not been posted to the Registry for public consultation.
- MNR described these as a draft guidelines, "intended to provide MNR staff responsible for determining allowable harvest limits a compilation of empirical methods for determining the status of a population of furbearing mammals and appropriate harvest management decisions." The Furbearer Management Guidelines establish a policy for the management and conservation of the many Ontario mammals that are trapped for their fur, including species at risk such as badger and grey fox.
- The ECO wrote to MNR on May 11, 2004, urging that a policy proposal notice be posted on the Registry to solicit public input on the issue of furbearer management. The ECO also requested a copy of the guidelines, since these were not being made publicly available.

Ministry Rationale

- MNR responded, in a letter of June 14, 2004. The ministry provided the ECO with a copy of its Fur Management Guidelines, version 2.0, dated May 2004. The document articulates MNR's guiding principles for setting trappers' quotas, lays out the roles of MNR staff and trappers' organizations, and describes how fur management guides should be developed by MNR district offices, including how to assess the risk to the species being harvested. The guideline provides specific management guidance on eight species: beaver, lynx, marten, fisher, otter, mink, raccoon and muskrat.
- MNR's letter stated that it would not be posting the guidelines for public consultation, and that the name of the Fur Management Guidelines was being changed to "Fur Management Workbook," because the ministry considers this to be a compendium of existing furbearer management information, not a policy.

ECO Comment

- When the ECO asked MNR how its lynx quotas are set, the ministry responded by providing excerpts from this guideline. Changing the document's name from "guideline" to "workbook," and asserting that it is "information" to assist staff rather than official ministry policy, does not mean that it is not a policy for the purposes of the *EBR*. The ECO is disappointed at MNR's preference for this tactic over public consultation, and does not accept MNR's explanation.
- Given the environmental significance of the Fur Management Guidelines, the ECO maintains that MNR should have posted this document as a proposal on the Registry to provide the public with opportunity for comment.

Provincial Wildlife Population Monitoring Program

Description

- In June 2004, MNR posted a new Provincial Wildlife Population Monitoring Program Plan (PWPMPP) on its website. MNR had not posted this plan on the Registry for public consultation.
- MNR had been required to develop and implement a Provincial Wildlife Population Monitoring Program by a Declaration Order under its 1994 Timber Class Environmental Assessment (EA). MOE reviewed this Class EA in 2002, and revised the requirements imposed on MNR. A Forest Management Declaration Order required MNR to prepare a Wildlife Population Monitoring Program Plan within one year of the Declaration Order's coming into effect. The plan was to include priorities, representative species to be monitored, proposed activities and schedules. MNR was also required to report to MOE on progress within one year of each Five-Year EA Report.
- In August 2004, the ECO wrote to MNR about the June 2004 PWPMPP, noting that the ministry still appears to be refining the plan and pointing out that it represents an environmentally

significant policy. The ECO indicated that the plan should be posted on the Environmental Registry for public comment.

- The 2004 monitoring plan reduces the number of species to be monitored, relative to the previous plan, from 92 to 43 (37 of which are birds). None of the species monitored are species at risk.

Ministry Rationale

- In a response received by the ECO in September 2004, MNR acknowledged the benefit of posting the program plan on the Registry and committed to doing so.
- However, when the ministry posted the Provincial Wildlife Population Monitoring Program Plan on the Registry in December 2004, it was posted as an information notice with a 90-day comment period, rather than as a proposal notice.
- MNR provided no rationale for its decision to post an information notice in lieu of a proposal. The information notice indicated that the plan "describes the purpose, background, what will be monitored, linkages, programs and initiatives, key challenges, goals and objectives, approach and priorities, outputs, and activities and schedules." It also asserted that as a program plan, the document "does not provide strategic directions or technical detail."
- For a discussion of this information notice, refer to p. 21 of this annual report Supplement.

ECO Comment

- Because the new Wildlife Population Monitoring Program Plan meets the *EBR* definition of a policy and is environmentally significant, MNR had an obligation to consult with the public through a Registry proposal.
- It is disappointing that MNR has reduced the number of species to be monitored and has not focused on at-risk species.
- As the ministry refines the list of species to be monitored over time and continues to develop the scale of reporting, the sampling methods and the predictive models, the ECO urges the ministry to do so with full public consultation, using the Registry.

Endangering the Protection of Species at Risk in Ontario Parks

Description

- MNR's 1998 Ontario Parks Policy on Protection of Vulnerable, Threatened and Endangered Species in Parks (PM 11.03.02) stated that all species at risk would be protected in Ontario's parks.
- The province's *Endangered Species Act* only legislates protection for some of the Ontario animals and plants designated as "endangered" by the Committee on the Status of Endangered Wildlife in Canada (COSEWIC). MNR's policy for species protection in Ontario's parks goes further. The 1998 policy extended protection, in parks, to all species at risk: "endangered" (whether designated by COSEWIC or by MNR), "threatened" (at risk of becoming endangered), or "vulnerable" (of special concern).
- However, on September 22, 2004 this parks policy was altered, without public notification or consultation.
- The new policy, Protection of Species at Risk in Provincial Parks, gives MNR discretion to exclude "species of special concern" when it is not "appropriate" to apply the protection. The policy states that if such an exception is made, and is deemed environmentally significant, it will be consulted on through the Environmental Registry before a final decision is reached.
- Other alterations were also made to the policy. It now recognizes recommended, as well as regulated, provincial parks. The terminology related to species at risk designations has been updated. New definitions clarify that a species may be endangered but not yet regulated under the *ESA*. And language around the roles of MNR staff has been weakened in spots, replacing the

responsibility to "ensure" certain outcomes or activities with phrases such as "take steps to," and "provide direction that."

Ministry Rationale

- In response to inquiries from the ECO, MNR presented four arguments to defend the decision not to post these changes on the Registry. The ministry asserted that:
  - the changes reflect an updating of species at risk terminology;
  - the policy's basis, providing protection to species at risk, has been retained;
  - exceptions for special concern species will be case by case, and will be recorded through a "decision record" and consulted on through the Environmental Registry where the exception is determined to be significant; and
  - some changes were to clarify and strengthen staff roles in implementing the policy.

ECO Comment

- Changes to this Ontario Parks Policy are environmentally significant, and should have been consulted on through a policy proposal on the Registry.
- In particular, the ECO must question the assertion that a Registry posting was unnecessary because appropriate public consultation would occur on a case-by-case basis, in light of the example of the eastern wolf, below.

Opening Ontario's Parks to Hunting of Eastern Wolf

Description

- The eastern wolf was one of many species added to MNR's lists of species at risk in 2004, and is now considered a "species of special concern" in Ontario.
- A decision notice on the Environmental Registry announced this and other changes to the Species at Risk in Ontario (SARO) list on September 30, 2004. The new designations were made after public consultation through the Registry.
- However, on September 28, 2004, MNR quietly finalized a "decision record" on the eastern wolf that was not publicly consulted on or announced. This unposted decision excluded the eastern wolf from protection in Ontario's parks – protection that until September 2004 had applied to all species at risk. The decision allows hunting and trapping of the eastern wolf even in parks and protected areas.
- MNR excepted the eastern wolf from protection under the umbrella of another unposted policy, also made in September 2004, which allows the ministry new discretion to exempt species of special concern from the normal protection in Ontario's parks. However, the new policy required MNR to consult through the Environmental Registry if it chose to exercise this new power and if the decision was environmentally significant (see "Endangering the Protection of Species at Risk in Ontario Parks," above).

Ministry Rationale

- The ministry defended its actions, in an email to ECO staff, noting that it had considered "ecological, social, economic and management/protection considerations." The ministry emphasized that the government has committed to developing an enhanced wolf management framework, new conservation measures and new inventory and monitoring initiatives. For that reason, MNR asserted, it had determined that currently protecting the eastern wolf would be premature.
- MNR also argued that applying the existing policy to the eastern wolf would have been environmentally significant, while exempting the wolf from the existing policy was not

environmentally significant and did not merit Registry posting, because the status quo (before the eastern wolf was designated as a protected species) had been to allow hunting and trapping.

- The ministry also explained that not protecting this species was in keeping with its land use strategy policy for the north.

ECO Comment

- The ECO does not accept MNR's rationale for exempting the eastern wolf from protection in Ontario's parks without public consultation, and urges the ministry to post a proposal notice. Major management decisions on any species at risk are environmentally significant policies. Management of a top predator is particularly ecologically important.
- For several years, the ECO has taken an active interest in the protection of Ontario species at risk, and has been following the case of the eastern wolf. COSEWIC has recognised this wolf as a "species of special concern" since 2001. Our 2002/2003 report pointed to the need for MNR to recognise the eastern wolf as a species at risk and develop a management plan (pages 141-143), and in our 2003/2004 annual report we commended MNR for improvements to Ontario's wolf conservation, including the decision to formally designate the eastern wolf as a species at risk (pages 68-69).
- The ECO was therefore surprised and disappointed to learn of this unposted decision. While MNR was publicly announcing the new protected status of the eastern wolf, it was quietly changing policies to allow ongoing trapping of this vulnerable species in the province's parks.
- The 2004 Protection of Species at Risk in Provincial Parks policy indicates that the public will be consulted through the Environmental Registry before any environmentally significant exemption of a species at risk from the protection normally afforded in Ontario's parks. MNR also directly assured the ECO that such consultation would take place.

Wind Power Development on Crown Land

Description

- MNR's Wind Power Development on Crown Land policy (PL 4.10.04) and companion procedure were released in January, 2004. The decision was made after public consultation that included a Registry proposal in the spring of 2003. A stated goal of the policy was to "allow development of this alternative energy resource with minimal impact on the environment and other resource users."
- The 2004 policy and procedure specified a review date of April 19, 2005.
- In February of 2005, the ECO wrote to MNR recommending that it post an information notice on the Registry, informing the public of the review and indicating when the review results would be made public.

Ministry Rationale

- The ministry's response, in February 2005, was that the review was internal and administrative. The ministry committed to posting as appropriate on the Environmental Registry, if the review pointed to a need for substantive changes that would affect the environment or the public.
- On March 30, 2005, MNR posted an information notice to the Registry, indicating that changes had been made to the policy and procedure, and committing to another review of both documents in April 2006. Changes were made to the section outlining the wind power applicant's and MNR's responsibilities regarding public and aboriginal consultation.
- For a discussion of this information notice, please refer to p.23 of this annual report Supplement.

ECO Comment

- The ECO is supportive of MNR's move to encourage wind power development on Crown land in a manner that takes environmental and social considerations into account.

- The ECO reminds the ministry that early and full public consultation on any proposed policy change is preferred. In this case, the ministry could have consulted through a proposal notice, indicating which issues and options were under consideration in the April 2005 review.
- The ECO will continue to monitor developments in Ontario's wind power policy to determine whether sufficient consultation opportunities are being offered to the public.

For a discussion of MNR's new wind power policies, see pages 100-103 of this year's annual report.

Free Use Policy for Public Lands

Description

- MNR's Free Use Policy (PL 3.03.01) under the *Public Lands Act* (*PLA*) sets out free temporary uses of Ontario public land. For example, the public may use most public lands for recreational activities such as hiking, boating, or hunting and fishing. Other free uses relate to the buildings and equipment necessary for forestry, mining, trapping, bait harvesting, and other activities on Crown land.
- In 2002, MNR revised the Free Use Policy after consultation through the Environmental Registry. However, MNR made other revisions to the policy in 2003 and 2004, without posting on the Registry and without notifying the public.
- The 2003 unposted revisions extended the allowance for long-term camping on public lands. The policy now allows a person to occupy an individual site for 21 days, after which they must move at least 100 metres away if they want to continue camping. The earlier policy was to require written permission from an MNR Area Supervisor for anyone exceeding a total of 21 days of free camping in a year. This was to prevent any one user from monopolizing a popular spot on public land.
- The 2004 revisions introduced a control on car rallies and motorized off-road vehicle events, inserting a requirement for written authorization from the Area Supervisor, normally in the form of a draft agreement to be signed by the event organizer and Area Supervisor. The policy includes a draft legal agreement between the government and the event organizer, which is designed to protect the Crown in case of public property damage by the off-road activity. The event organizer must pay a refundable deposit as a guarantee against property damage, and commit to keeping vehicles on the assigned trail route for the event.
- On March 3, 2005, after learning of these unposted changes and of public concerns about environmental damage occurring as a result of off-road vehicle events on Crown lands, the ECO contacted MNR. ECO asked that the ministry explain its decision not to post the 2003 and 2004 amendments to the Free Use Policy, and asked for further information on how the ministry ensures environmental protection when allowing off-road motorized vehicle events on Crown lands.

Ministry Rationale

- In responding to the ECO, MNR did not directly address the ECO's questions about why the policies were not posted to the Registry for consultation, and did not indicate that other public consultations had been conducted in lieu of a Registry proposal. The emphasis of the response from MNR staff was on the limits of the ministry's powers under the *Public Lands Act* to protect the environment, and the need for revisions to the *PLA*.
- Regarding Crown land camping limits, MNR staff stated that the change to a 21-day limit at any single location was in keeping with on-the-ground enforcement practices, and was therefore not an environmentally significant change, since the previous 21-day cumulative limit had been unenforceable and was not widely understood by the public. Ministry staff emphasized that the primary concern was prevention of user conflicts in prime locations.
- Regarding off-road vehicle events on Crown land, MNR staff explained that Bancroft District Office had initiated the new policy provisions in response to an increase in organized off-roading

events. The ministry described the use of a contractual agreement as an innovation for managing a land use not sufficiently addressed in legislation under the *PLA*. Ministry staff also discussed potential future changes to the policy, for example to address non-motorized organised group events on Crown land access roads and trails.

ECO Comment

- As environmentally significant decisions, the ministry should have posted changes to the Free Use Policy on the Registry for public consultation. Future changes to this environmentally significant policy (including results of the review to be undertaken in response to a request for review, described below) should include full public consultation.
- A request for review of the off-road motorized vehicle provisions of the Free Use Policy was submitted on March 16, 2005, by two members of the public (see page 286). On April 21, MNR indicated that it was undertaking the requested review. The ECO will be following this matter with interest, and will address the Free Use Policy and the *PLA* in a future report.
- The ECO agrees with MNR staff's assessment that the *PLA* merits revisions in order to better protect the environment and to deal with contemporary resource use pressures.

Update: Statements of Conservation Interest for Conservation Reserves

Description

- In our 2003/2004 report, the ECO highlighted the need for better planning of Ontario's protected areas (pages 41-47). We also pointed out that management plans for conservation reserves were being developed without public consultation using the Environmental Registry. These management plans take the form of either a "statement of conservation interest" (SCI) or a "resource management plan." Not one of the 155 statements of conservation interest completed before release of last year's ECO annual report had been posted on the Registry for public review and comment.
- The ECO recommended that MNR require the preparation and timely revision of management plans for all protected areas, including provisions for public consultation (Recommendation 4, 2003/2004).
- In the 2004/2005 reporting year, MNR continued to develop these plans without posting proposal notices on the Registry for public consultation. For example, MNR approved 15 SCIs for conservation reserves in MNR's Parry Sound District in May 2004. In December 2004, MNR informed selected stakeholders that SCIs were being developed for a total of 74 areas in the ministry's Northeast Region, and in January 2005, some of the district offices within the region informed stakeholders of the opportunity to review draft planning documents for conservation reserves. Also in December 2004, public consultation was held for the Boulter-Depot Creek Conservation Reserve in the North Bay District.

Ministry Rationale

- In 2004, MNR informed the ECO that it believes that public consultation is not required if there was previous consultation on the area's protection, and implied that the public consultation under MNR's land use planning process of Lands For Life / Ontario's Living Legacy had been sufficient.
- In response to further questioning about the Boulter-Depot Creek Conservation Reserve in December 2004, MNR responded by reiterating its policy of informing stakeholders of the SCI planning process, but not consulting through the Environmental Registry.

ECO Comment

- The ECO continues to disagree with MNR's position. All SCIs are environmentally significant policies and should be posted on the Environmental Registry as proposals to afford the public full rights to consultation. The process that initially designated these areas for conservation purposes between 1996 and 1998, Lands for Life, did not address site-specific environmental planning issues (e.g. how to protect a particular species in a conservation reserve). Further, MNR posted exception notices on the Environmental Registry when these sites were regulated, depriving the public of opportunity for comment under the *EBR*.

Ministry of the Environment (MOE) – Policies

Ontario's Environmental Leaders Program

Description

- In our 2003/2004 annual report Supplement (pages 71-82), the ECO reviewed MOE's Framework for Ontario's Cooperative Agreements. The Framework offers enhanced certificates of approval (Cs of A) and other incentives to encourage industries to go beyond legal compliance in reducing their contaminant emissions. In its Registry notice, the ministry committed to posting policy proposal notices as agreements were launched with different industries. The first sectoral agreement, with the Automotive Parts Manufacturers' Association (APMA), was posted on the Registry as part of the overall Framework proposal. However, the decision notice on the Framework was not updated to inform the public when the APMA sectoral agreement was finalized. In September 2003, MOE entered into another sectoral agreement, with the Canadian Chemical Producers' Association (CCPA), but did not post a Registry notice.
- The ECO noted in our 2003/2004 Supplement article that we expect the ministry to post proposal notices for any future sector-wide or facility-specific agreements made under the Framework.
- In July 2004, MOE re-released its Framework document under a new title: "A Framework for Ontario's Environmental Leaders Program (Formerly Known as Cooperative Agreements)." The report outlines industry participant requirements, incentives to sign an agreement, and administrative details and processes. These processes do not include a posting on the Environmental Registry when a facility signs on to the program.
- On September 29, 2004, MOE announced that Steelcase Canada Ltd., an office furniture manufacturer based in Markham, was the first company to sign on to Ontario's Environmental Leaders Program.
- On November 9, 2004, the ECO wrote to MOE about the Steelcase agreement, chemical sector agreement with CCPA and automotive parts sector agreement with APMA. The letter asked MOE to explain its failure to post these decisions, and urged the ministry to post future proposed sector-wide and facility-specific agreements under this program as policy proposals for public comment. The ECO also noted that the enhanced Cs of A issued under this program should be posted as instruments on the Registry.

Ministry Rationale

- MOE's response of December 15, 2004, indicated that it planned to post the agreements signed to date on the Environmental Registry, but would not be posting future draft agreements on the Registry. The ministry indicated that it considers the program's own transparency and public consultation mechanisms, together with MOE's Environmental Leaders website, to be sufficient.
- MOE did not respond to the ECO's questions about how the ministry determined the environmental significance of the decisions, how its Statement of Environmental Values was considered, or whether the ministry undertook public consultation in the development of the agreements, except to point to the original Registry posting launching the Framework and proposing the first sector-level agreement.

- MOE did not address the issue of whether enhanced Cs of A issued under these agreements will be posted as instruments on the Registry.
- On December 21, 2004, MOE posted an information notice informing the public of the signing of the two 2003 sector-level agreements and the 2004 Steelcase agreement. For more on this notice, please see page 34 of this Supplement.

ECO Comment

- The ECO does not accept MOE's rationale for not using the Registry for public notification and consultation on Ontario's Environmental Leaders Program agreements.
- Agreements under this program are clearly environmentally significant. MOE promotes the program as "a new way to improve environmental management in Ontario." The agreements meet the *EBR* definition of a policy, and should be posted to the Registry for public consultation. Policies that are expected to have positive environmental impacts are environmentally significant and should be posted for consultation.
- Merely posting an agreement to the ministry's web site is not comparable to providing a policy proposal notice on the Registry, soliciting and considering public input before finalizing a decision, and providing a decision notice that indicates how public comments were taken into account. The requirement for Registry notice and comment is also not, as the MOE's response implies, replaced by the program's vague communication and outreach provisions, annual public performance reporting requirement, and third-party performance verification in years 2 and 5 of the 5-year agreements.
- The ministry's refusal to post proposals for these agreements on the Registry is contrary to the approach to consultation set out in the program's own framework document: "The Ministry considers that environmental protection and innovative solutions can be significantly advanced through stakeholder communication and involvement. As such, the Ministry is interested in working with environmental leaders who wish to be transparent and open with their stakeholders regarding their environmental management. Communication and outreach should include all interested parties…"
- The ECO continues to urge the ministry to abide by commitments made in its original Registry proposal notice on the program framework in 2002, as well as by the requirements of the *EBR*, to afford the Ontario public their rights to be notified and to comment on proposed agreements under Ontario's Environmental Leaders Program.

Deloro Mine Site Cleanup

Description

- On November 12, 2004, MOE announced in a press release that it had produced a draft cleanup plan for the Deloro mine site, for a 60-day public consultation period. The draft plan was available through MOE's website, but was not posted to the Environmental Registry. There had been one information notice on the Registry regarding the Deloro remediation work, on October 1, 2004, but it only announced that MOE would be combining three Permits to Take Water into a single consolidated permit. It did not give the public opportunity to comment.
- The Deloro site, about 45 km north of Belleville on the Moira River, is contaminated with arsenic, cobalt, copper, nickel, radioactive material, and other wastes from a century of mining and industrial activity. Although no longer in operation, the site remains a concern for the health of neighbouring communities, and for the watershed.
- To address problems such as ongoing leakage of arsenic into surface and groundwater, MOE took over the site in 1979 as a remediator of last resort.
- MOE announced in 1997 that it would clean up the site. In response to questions from the ECO about why this matter had not been posted on the Registry, the ministry committed to posting

notice on the Registry of any proposals to issue the necessary certificates of approval for the cleanup (see page 29 of the ECO's 1997 annual report for details). Until 2004, the only Registry notice was for a 1998 regulation exempting the Deloro remediation from the requirement for a hearing, under Part V of the *EPA*, for hazardous waste disposal on-site (see our 1998 annual report, page 238).

- The 2004 draft plan to remediate the site includes excavating to consolidate the most highly contaminated wastes into one area, capping many areas of the site, diverting and treating surface and groundwater, and vegetating some areas.
- On November 19, 2004, the ECO contacted MOE with two questions about the draft site cleanup plan announced on November 12: Did the ministry intend to post a proposal notice on the Registry concurrent with its website consultation? And if not, why not?

Ministry Rationale

- On November 26, 2004, MOE posted the draft site cleanup plan as a policy proposal on the Registry for public consultation. The proposal was initially posted with a 60-day comment period. A few days later it was re-posted with the comment period shortened to 47 days, so that the *EBR* comment period would close on January 12, concurrent with the closing of MOE's website consultation.

ECO Comment

- Given the environmental significance of the proposed Deloro mine site cleanup plan, the ECO was pleased that MOE agreed to post the plan as a Registry proposal, in keeping with public rights to comment under the *EBR*. The ministry also engaged in public consultation through a variety of other means, including mail-outs, meetings, liaison committees, and a web site explaining the details of the proposed remediation approach.
- As of August 2005, a decision notice had not yet been posted for the proposal. The ECO will continue to monitor developments in the Deloro remediation.

Ministry of Energy (ENG) – Policies

Energy Efficiency and Conservation Policies

Description

- The ECO noted in 2004/2005 that the Ministries of Energy, Agriculture and Food, Environment, Natural Resources, and Management Board Secretariat are all involved in provincial initiatives to increase energy efficiency and conservation, promote renewable energy, and reduce greenhouse gas emissions.
- On March 22, 2005, the ECO wrote to ENG, copying the other ministries listed above, to express concern about a lack of public consultation on government energy efficiency and conservation policies, and to ask who was coordinating such initiatives and ensuring that they proceed with full public consultation.
- As examples, the ECO pointed to energy conservation targets set by Management Board Secretariat without an Environmental Registry proposal posting (see pages 13-14 for details of this unposted policy), and to a provincial target for minimum ethanol content of gasoline announced by the Ministry of Agriculture and Food and again by the Ministry of the Environment without consulting through the Registry (see pages 12-13, below).

Ministry Rationale

- On April 5, 2005, ENG sent a terse response to the ECO, providing only a contact name of a Director in the ministry. The letter did not address the specific examples raised by ECO, nor did it provide any assurance that future initiatives will adhere to the public consultation requirements of the *EBR*.

ECO Comment

- The ECO is very supportive of the government's attempts to improve energy efficiency and conservation, reduce greenhouse gas emissions, and promote less-harmful energy sources. However, the Ontario public has the right to the benefits of *EBR* consultation on these environmentally significant policies. The ECO is disappointed that there has been little evidence of a commitment to honour the *EBR* requirement to consult through the Environmental Registry.
- In our 2002/2003 annual report, the ECO recommended that the Ministry of Energy, Management Board Secretariat and other ministries consult with the public and take full advantage of the Environmental Registry in developing energy conservation initiatives (Recommendation 8). The ECO will continue to monitor ministries' progress on this matter.

Ministry of Agriculture and Food (OMAF) – Policy

Ethanol Targets for Ontario's Gasoline

Description

- On November 26, 2004, the Premier together with the Minister of Agriculture and Food announced that gasoline sold in Ontario will be required to contain an average of five per cent ethanol by January 1, 2007.
- Rather than requiring all gasoline to contain five per cent ethanol, higher-ethanol blends in some regions of the province will make up for lower blends in others. An average of five per cent across Ontario will be achieved through credit trading between gasoline wholesalers.
- The government press release explained that adding ethanol to gasoline can help improve combustion efficiency, reducing a vehicle's pollution emissions. The news release also emphasized the potential benefits of this policy for Ontario farmers, since ethanol is made from agricultural crops.
- This ethanol target for gasoline was announced again, on February 16, 2005, in an MOE press release that listed government initiatives to improve air quality and reduce greenhouse gas emissions.
- On February 22, 2005, the ECO contacted OMAF to ask why that ministry had not yet posted this policy proposal for consultation on the Registry, and whether it intended to do so.

Ministry Rationale

- OMAF responded by noting that the decision had not been made by that ministry: the government, not OMAF, had made the announcement; the Ministry of Energy, not OMAF, had been the lead ministry on ethanol policy before August 2004; and the Ministry of the Environment, not OMAF, will run the ethanol credit trading system for gasoline wholesalers.
- When contacted by the ECO, MOE confirmed that it was leading the development of a credit trading system for the gasoline wholesalers, and would be posting a notice on the Environmental Registry once a proposal was ready for consultation. On June 17, 2005, MOE posted a proposal on the Registry, for 60-day public comment, for a regulation to implement the 5 per cent ethanol rule by 2007.

ECO Comment

- The ECO believes that OMAF, as lead ministry for the ethanol announcement, should have provided the public with an opportunity to comment on the policy by posting a proposal on the Registry. OMAF is a prescribed ministry under the *EBR*, and the new ethanol blend policy for Ontario's gasoline is environmentally significant. While MOE consulted on the proposed implementing regulation to meet the goal of 5 per cent ethanol by 2007, there was no Environmental Registry proposal to consult on the overall policy, the specific five per cent ethanol target or the implementation timeline.
- OMAF's response was to point to other agencies to explain its own failure to post a proposal notice. This is one example of a broader problem identified by the ECO: lack of public consultation on recent inter-ministry initiatives in energy efficiency, greenhouse gas reduction and air quality. For more on this issue, see pages 11-12, above.
- OMAF's record on use of the Registry to consult with the public on environmentally significant policy proposals is weak, as documented in previous annual reports. The ECO urges OMAF to improve its compliance with the *EBR*'s notice and comment procedures.

Management Board Secretariat (MBS) – Policy

Energy Conservation in Government Operations

Description

- In our 2002/2003 and 2003/2004 reports, the ECO discussed government efforts to increase energy efficiency and improve energy conservation in Ontario. The ECO recommended that MBS and the other ministries take full advantage of the Registry to consult with the public in develop these initiatives.
- On April 1, 2004, MBS announced that the government intends to reduce electricity consumption in its buildings by 10 per cent by 2007. The news release and backgrounder described this as "the first step in an aggressive conservation effort that will involve all Ontarians" and announced plans to engage civil servants and the Ontario public as this initiative moves forward.
- On May 10, 2004, the ECO wrote to MBS, copying the Ministry of Energy (ENG), to point out the significant environmental implications of this initiative. The ECO urged MBS to post a proposal notice on the Registry to consult the public about the Ontario government's energy conservation plans. The ECO also encouraged the ministry to post Registry proposals for any other environmentally significant policies, Acts or regulations that might be developed on this topic, such as government procurement or building operations policies related to energy conservation.

Ministry Rationale

- MBS responded on May 28, 2004, indicating that the ministry would post an information notice on the Registry regarding energy conservation. The ministry also described other public engagement strategies the government has taken related to meeting Ontario's energy needs. MBS indicated that it is working closely with the Ministry of Energy on the government's electricity reduction initiative, and that ENG would pursue consultation on various initiatives as they move forward.
- MBS posted an information notice on June 1, 2004, outlining the government's activities to meet the 10 per cent consumption reduction by 2007, and inviting public comment through the ministry's own website.

ECO Comment

- The Ontario government set a goal for reducing its electricity consumption, without public consultation on this policy through the Registry. The use of an information notice is not equivalent to posting a policy proposal (for more on this information notice, see p 16, below).
- The ECO urges MBS, together with ENG and other ministries, to abide by the requirements of the *EBR* when developing environmentally significant policies. This is one of several examples of the government's failure to post proposals on the Environmental Registry for policies on energy consumption (see pages 12-13 of this annual report Supplement), electricity generation (see pages 6-7) and greenhouse gas emissions (see pages 12-13).
- Reducing the environmental consequences of energy use through promoting renewable energy, legislating fuel blends or introducing conservation measures is laudable. The public has a right to be consulted on what goals are set, and what approaches are chosen, to develop a more sustainable energy future for Ontario.

For a more detailed discussion of the Ontario government's energy conservation initiatives, see pages 185-190 of this year's annual report.

SECTION 2

ECO REVIEWS OF INFORMATION NOTICES

SECTION 2: ECO REVIEWS OF INFORMATION NOTICES

Use of Information Notices

In cases where provincial ministries are not required to post a proposal notice on the Environmental Registry for public comment, they may still provide a public service by posting an "information notice" under section 6 of the *EBR*. These notices keep Ontarians informed of important environmental developments.

Ministries should use an information notice only when they are not required to post a regular notice for public comment (under sections 15, 16 or 22 of the *EBR*). Significant differences exist between regular proposal notices posted on the Registry and information notices. With regular proposal notices, a ministry is required to consider public comments and post a decision notice explaining the effect of comments on the ministry's decision. The ECO then reviews the extent to which the minister considered those comments when he or she made the final decision. The ministry must also consider its Statement of Environmental Values in the decision-making process. This approach is superior to posting an information notice and provides greater public accountability and transparency.

As described in more detail in the ECO's 2000/2001 annual report, if a prescribed ministry decides that it is appropriate to seek public comment on a policy, Act or regulation proposal through the Registry, the correct procedure is to post a regular notice, not an information notice. Soliciting comments through information notices causes confusion for the public, since, as noted above, there is no legal requirement for the ministries to consider public comments or to post a final decision with regard to information notices. Ministries that post information notices can certainly inform the public in the text of the notice about the availability of any other "non-*EBR*" consultation opportunities.

Quality of Information Notices

Ministries should strive to ensure that notices use plain language and precise explanations, and provide an adequate level of detail. The ECO encourages ministries to update information notices if new developments occur in relation to an ongoing project, and to clearly indicate which information is new in updated notices. Ministries should ensure that all notices include the name, address, phone number and fax number of a ministry contact person, and provide adequate information about any non-*EBR* consultations underway.

Management Board Secretariat (MBS) – Policy

MBS/ORC Class Environmental Assessment Invitations to Participate

EBR Registry #s:

XN04E0001 -Oak Ridges Moraine Land Acquisition/Seaton Lands Disposition
XN02E0002 -Easement for the Installation of a Brine Pipeline in Hydro Corridor

Description

- MBS posted these notices to inform the public about two Category C Class Environmental Assessments, conducted by Ontario Realty Corporation (ORC), that were underway during this reporting period as required by the Class Environmental Assessment Process for ORC Realty Activities.
- The first notice (XN04E0001), posted in April 2004, advised the public about a study examining the acquisition of private lands on the Oak Ridges Moraine in the Town of Richmond Hill in exchange for provincially owned Seaton Lands in the City of Pickering. The notice explained that other Seaton Lands, which comprise the Natural Heritage System as identified by MNR, MAH and the Toronto

and Region Conservation Area, are not part of the undertaking but would be retained in public ownership and permanently protected. The notice indicated that ORC was inviting public input into the development of an Environmental Study Report and that the report would be available for public review in the future.

- In the second notice (XN04E0002), posted in May 2004, the ministry explained that ORC had completed an Environmental Study Report which examined the potential environmental effects of granting an easement for installation and operation of a brine pipeline on a 15-kilometre length of hydro corridor lands southeast of Sarnia. The notice invited the public to provide input over a 30-day review period and explained where copies of the report could be accessed. The notice also indicated that individuals could request that the project be "bumped-up" to a full individual environmental assessment within the 30 days of the publication of the May 2004 notice and explained where such requests should be directed.

ECO Comment

- Acceptable use of information notices.
- MBS could have included direct links to the Environmental Study Reports in the notices.
- For further information regarding the land exchange, please refer to XF04E0020 below.
- ORC committed to posting these types of notices in a letter sent to the ECO in early 2000. For further information please refer to page 117 of the ECO's 1999/2000 annual report.

Electricity Conservation in Ontario Government Operations

EBR Registry #: XN04E0003

Description

- MBS posted this notice in June 2004 to inform the public about the government's goal of reducing its electricity consumption by 10 per cent by 2007 and to invite public input on how the goal could be achieved. The notice explained that the government was proposing to achieve its goal through efforts in four main areas: (1) engaging Ontario's civil service and implementing some of the ideas regarding electricity consumption reduction received during the Ontario Public Service Ideas Campaign; (2) undertaking energy audits, retrofits and upgrades in government-owned buildings; (3) working with landlords to cut energy use in government-leased buildings; and (4) inviting public input on possible government actions. The notice explained that the initiative is part of a larger province-wide effort to reduce Ontario's electricity consumption by five per cent. The notice also stated that the ministry may consult on future proposals for new standards for energy use and conservation in government buildings.

ECO Comment

- Unacceptable use of an information notice.
- For further information about the consultation benefits afforded the public by the posting of a regular notice, please refer to page 15 of this Supplement.
- The ECO encourages MBS to post regular policy proposal notices on the Registry to consult on proposed new standards for energy use and conservation in government buildings.
- The ECO also believes that the public should have been afforded the opportunity to participate in the establishment of a province-wide energy reduction target and an overall conservation strategy. The ECO urges the ministry to post policy proposals on the Registry for any future revisions to the conservation strategy or the target for reducing provincial energy use. For further information, please refer to page 22 of the ECO's 2003/2004 annual report.

Ministry of Municipal Affairs and Housing (MAH) – Policy

Government Signs Exchange Agreement for a Park on the Oak Ridges Moraine
EBR Registry #: XF04E0020

Description

- MAH posted this notice in October 2004 to inform the public that the Minister of Municipal Affairs and Housing had signed an agreement with developers to exchange public land in the Seaton area of Pickering for land owned by developers and proposed for development on the Oak Ridges Moraine. The notice explained that the newly acquired Oak Ridges Moraine land, slated to become a public park, constitutes the only remaining undeveloped link between the eastern and western ends of the moraine. The notice also explained that the Seaton lands which were given away constitute less than one-quarter of the provincial Seaton land holdings and that another two-thirds of the lands are earmarked for protection. The ministry indicated in the notice that it expected that the deal would close in the spring of 2005.

ECO Comment

- Acceptable use of an information notice.

Ministry of Municipal Affairs and Housing (MAH) – Regulations

Minister's Zoning Orders
EBR Registry #s:

XF04E0018	-O. Reg. 432/03 and O. Reg.435/03 revoked under the *Planning Act* by O. Reg. 205/04
XF04E0019	-O. Reg. 258/04 made under the *Planning Act*
XF04E0023	-O. Reg. 353/04 amending O. Reg. 482/73 under the *Planning Act*

Description

- Minister's zoning orders are regulations that allow the minister to control land use in areas without municipal organization or in areas where the provincial government has an interest.

ECO Comment

- Acceptable use of information notices. Minister's Zoning Orders are not prescribed under the *EBR*.
- Links to the regulations should have been provided in all notices.

Regulation(s) to Authorize Exemptions under the *Greenbelt Protection Act, 2004*
EBR Registry #: XF04E0016

Description

- MAH posted this notice in July 2004 to advise the public that it was considering criteria for exemption regulations under the *Greenbelt Protection Act, 2004*. The notice indicated that the government was considering allowing exemptions for proposals that were minor in nature; for applications in process; and for proposals supported by a municipality.
- The *Greenbelt Protection Act, 2004* was repealed on March 2005 shortly after the *Greenbelt Act, 2005* received Royal Assent in February 2005.

ECO Comment

- Acceptable use of an information notice. The *Greenbelt Protection Act, 2004* was not prescribed for the purposes of the *EBR*.
- For further information on the *Greenbelt Protection Act, 2005*, please refer to pages 47-54 of this year's annual report.

Ministry of Municipal Affairs (MAH) – Instruments

Oak Ridges Moraine Conservation Plan Conformity Amendments
EBR Registry #s:

XF04E0009 -Town of Richmond Hill Official Plan Amendment No. 218
XF04E0010 -Town of Newmarket Official Plan Amendment No. 281
XF04E0010 -Town of Whitby Official Plan Amendment No. 48
XF04E0012 -Township of Adjala-Tosorontio Official Pan Amendment No. 3
XF04E0014 -Town of New Tecumseth Official Plan Amendment No. 28
XF04E0015 -County of Simcoe Official Plan Amendment No. 1
XF04E0013 -Town of Mono Official Plan Amendment No. 29
XF04E0017 -Municipality of Clarington Official Plan Amendment No. 33
XF04E0021 -Town of Caledon Official Plan Amendment No. 186
XF04E0022 -Township of King Official Plan Amendments
XF04E1001 -Township of Victoria Official Plan Amendment No. 104
XF05E0002 -City of Vaughan Zoning By-Law Amendment No. 242-2003
XF05E0003 -Township of Uxbridge Official Plan Amendment No. 20

Description

- MAH posted these notices to inform that public that it was considering official plan and zoning by-law amendments proposed by municipalities to bring their official plans into conformity with the Oak Ridges Moraine Conservation Plan. The notices indicated that MAH would accept comments from the public on the amendments, for up to one month after the date of posting in most cases.
- In each notice, MAH indicated that it was proposing to prescribe the *Oak Ridges Moraine Conservation Act, 2001* (*ORMCA*) and classify instruments of the Act under the *EBR* at a later date.
- MAH briefed the ECO on its plan to use information notices for these instruments in early 2003.

ECO Comment

- Acceptable use of information notices. The ECO has urged MAH to prescribe the *ORMCA* and classify instruments under the Act under the *EBR* as soon as possible. On September 2, 2003, MAH posted a notice (RF03E0002) on the Registry to inform the public about a proposed regulation to prescribe the *ORMCA* under the *EBR*. The proposal would make the *ORMCA* subject to several provisions of the *EBR*, including Part II proposals for regulations and classifying proposals for instruments. On the same day, MAH posted a second notice (RF03E0003) on the Registry to inform the public that it is proposing to classify instruments under the *ORMCA* as Class I instruments.
- For further information on the *ORMCA* and Plan, please refer to pages 72-79 of the ECO's 2001/2002 annual report and pages 123-133 of the ECO's 2001/2002 Supplement.

Ministry of Natural Resources (MNR) – Policies

Rabies Research and Control Operations for 2004
EBR Registry #: XB04E6007

Description

- MNR posted this notice in April 2004 to inform the public of the ministry's research and control activities to address rabies in Ontario's fox, skunk and raccoon populations throughout the 2004 calendar year. The notice provided history of the spread of the disease in the province and outlined the ministry's main strategies for controlling the spread of the disease – aerial baiting; trap-vaccinate-release; and control at the point of infection. The ministry also explained that every regional health unit in the province has developed a contingency plan to address rabies, in consultation with the public, health experts and municipal officials.

ECO Comment

- MNR should have directed the public to its Point of Infection Control Tactic for Raccoon Rabies in Ontario policy, posted as a decision notice on the Registry in September 1998 (PB8E6014). MNR should also have indicated whether it had previously consulted on its decision to employ aerial baiting and trap-vaccinate-release methods.

Redesignation of a Portion of the Attawapiskat River
EBR Registry #: XB04E2006

Description

- MNR posted this notice in April 2004 to inform the public of the decision made to remove the designation of "Proposed Candidate Waterway Provincial Park" from a 33-kilometre portion of the Attawapiskat River and to make other minor adjustments. The stretch of river is located approximately 86 km west of James Bay. MNR clarified that the designation would be retained on approximately 190 km of the river.

ECO Comment

- Unacceptable use of an information notice.
- In May 2004, the ECO wrote to MNR to inform the ministry that the ECO believes that the policy change is environmentally significant and therefore merits public input. Moreover, MNR has posted proposal notices on the Registry in similar instances when the ministry has proposed to amend land use guidelines, to alter boundaries of a proposed protected area, and to elect not to proceed with the establishment of a protected area. In the May 2004 letter, the ECO encouraged the ministry to rectify the matter by posting a regular policy proposal notice on the Registry to consult the public before altering the boundaries of the protected area. MNR responded that it was unable to post a proposal notice as the decision supports the Ontario Government's plan to take the necessary steps to validate the existing mining claims and leases in the 33 kilometres of the Attawapiskat River. For further information, please refer to pages 1-2 of this Supplement.
- The ECO still believes that public consultation should have taken place on this particular decision. This is but one example of a larger problem involving the disentanglement of mining claims and the regulation of protected areas. MNR should not preclude the public from providing input on the nature and location of replacement lands that will alter the boundaries of these protected areas. For further information, please refer to pages 117-121 of the ECO's 2001/2002 annual report and to page 175 of the ECO's 2002/2003 annual report.

Bear Wise Telephone Response Line and Agreement with Police Services
EBR Registry #: XB04E6008

Description

- MNR posted this notice in April 2004 to inform the public of two new developments with regard to responding to nuisance bear incidents. The ministry announced that it had launched a phone line for reporting concerns about public safety and property damage threats posed by bears. MNR indicated that the public could report threats at any time. Operators would be available to provide advice on how to reduce the likelihood of human-bear conflicts and to arrange for MNR site visits as appropriate. The notice advised the public that the police should still be contacted in emergency situations.
- In the notice, MNR also announced that it had drafted a template memorandum of understanding (MOU) with the Ontario Association of Chiefs of Police (OACP), describing the respective roles of MNR and the police services in the event of a human-bear conflict. Specific agreements between MNR and individual municipal police forces were to be developed under the rubric of the OACP's MOU.
- MNR first announced the government's intention to implement a strategy to address nuisance bears on December 17, 2003.

ECO Comment

- MNR could have posted its MOU on the Registry as a regular proposal notice for consultation, especially because of the intense public interest in this issue.
- For further information on the nuisance bear issue, please refer to page 12 of the Supplement to the ECO's 2002/2003 annual report (XB03E4001) and pages 19-20 of the Supplement to the ECO's 2003/2004 annual report (XB03E6007).

Development of a Biodiversity Strategy for Ontario

EBR Registry #: XB04E6010

Description

- MNR posted this notice in December 2004 to inform the public that the ministry had begun to develop an Ontario Biodiversity Strategy (OBS) and to solicit input and ideas for the OBS through a workbook on its website. The notice indicated that the strategy is expected to guide, strengthen and integrate Ontario's policies and programs related to biodiversity and that it would be used to set priorities for collective action over the following five years. MNR stated that it intended to post a regular policy proposal notice on the Registry once a draft OBS had been prepared in late winter 2004 or early spring 2005. MNR provided a direct link to its OBS website where the workbook was located.
- In April 2005, MNR posted a policy proposal notice about its proposed biodiversity strategy on the Registry (PB05E6011).

ECO Comment

- Acceptable use of an information notice. The workbook provides background information and does not constitute a new policy.

Identification of Wild Turkey Capture and Release Locations in Ontario for Winter 2005

EBR Registry #: XB03E6011

Description

- MNR posted this notice in December 2004 to inform the public of proposed activities involving the relocation of eastern wild turkeys within Ontario from January to April, 2004. The notice indicated that while MNR had successfully restored turkey populations to many parts of southern Ontario through a restoration program initiated in 1984, there are some areas within the program area where sustainable turkey populations have not yet been reestablished.

- The notice specified the districts (and in some cases, the townships) in which it expects the five trapping and six release sites will be located. It explained that the proposed trapping locations currently support wild turkey densities that will accommodate removal of a small number of wild birds without negatively affecting the sustainability of local populations. Environmental screening of the proposed release sites did not identify any significant concerns with respect to: the natural environment; land use or resource management; social, cultural and economic factors; aboriginal concerns; or other considerations.
- The notice indicated that consultation was conducted at the local level where deemed necessary and appropriate.

ECO Comment

- Acceptable use of an information notice.

Provincial Wildlife Population Monitoring Program Plan
***EBR Registry* #:** XB04E7004

Description

- MNR posted this notice in December 2004 to inform the public of the availability of the Provincial Wildlife Population Monitoring Program Plan, published in June 2004. The notice indicated that the program plan was a requirement of Condition 30 of the Declaration Order regarding MNR's Class Environmental Assessment Approval for Forest Management on Crown Lands in Ontario. MNR stated that the program plan does not provide strategic directions. Rather, it outlines priorities, representative species to be monitored, proposed activities and schedules. MNR indicated that the ministry would be updating the plan no later than one year following the release of each 5-Year Environmental Assessment Report and committed to posting any future policies or regulatory proposals on the Registry for public review and comment.

ECO Comment

- Unacceptable use of an information notice. The ECO believes that the program plan is environmentally significant and therefore merited a regular proposal notice for consultation on the Registry. Section 15(1) of the *EBR* requires that environmentally significant policies be posted on the Registry for public comment. The *EBR* defines "policy" as a "program, plan or objective." Moreover, MNR has consulted on other policies, such as "Ontario's Approach to Wilderness: A Policy," which was a required condition under the earlier Timber Management Class Environmental Assessment Approval. The ECO encourages the ministry to post any proposed amendments to the monitoring program on the Registry as regular notices for public consultation.
- For further information about the consultation benefits afforded the public by the posting of a regular notice, please refer to page 15, above.
- There was a six-month delay between the time that the program plan was finalized and the date that it was posted on the Registry. The ECO encourages the ministry to post notices on the Registry in a timely manner.

2005 Prescribed Burns
***EBR Registry* #:** XB05E7001

Description

- MNR posted this notice in January 2005 to inform the public of the locations where prescribed burns would take place throughout the 2005 calendar year as well as the size of and purpose of the burns. The notice explained that all prescribed burns would occur according to guidelines set out in the Prescribed Burn Planning Manual, 1997.

ECO Comment

- Acceptable use of an information notice.
- MNR contacted the ECO asking whether it would be acceptable to use an information notice for this item this year, even though the ministry had posted regular policy proposal notices for each of the seven past years. According to MNR, these are essentially notices of annual work operations and have never received comments. The ECO indicated that it would be acceptable for MNR to use information notices to post the plans instead and acknowledged that in principle, the public is consulted at an earlier stage regarding the priorities and criteria for prescribed burns (e.g., via Forest Management Plans, park management and other planning processes).
- MNR could have provided the public a link to the Prescribed Burn Planning Manual. In its response to the ECO, MNR agreed that the manual should be made available.

Our Sustainable Future, MNR Strategic Directions
EBR Registry #: XB05E4001

Description

- MNR posted this notice in February 2005 to inform the public of the release of *Our Sustainable Future*, a report outlining the ministry's new strategic directions. MNR indicated that the plan replaces its previous strategic direction outlined in its report *Beyond 2000*. The notice outlined the basic components of the report: a vision, mission, statement of commitment, and five organizational goals: (1) Healthy Natural Environment for Ontarians; (2) Economic Growth for Ontario Communities; (3) Public Health and Environmental Safety to Protect People; (4) Stewardship, Partnerships and Community Involvement in Natural Resources Management; and (5) Organizational Excellence for Improved Public Service. The notice explained that each goal is accompanied by a series of strategies and proposed actions. Among the implementation considerations described is a commitment to develop a State of the Resources Reporting initiative.

ECO Comment

- Unacceptable use of an information notice. This document is environmentally significant and has implications for many areas of MNR policy.
- MNR's previous strategic plan – Beyond 2002 – was posted as a regular policy proposal notice and Ontario residents submitted comments on the proposal notice about it.

Boreal Mixedwood Notes
EBR Registry #: XB05E7002

Description

- MNR posted this notice in March 2005 to inform the public of the availability of the Boreal Mixedwood Notes, a series of technical documents which discuss the ecology and silviculture of mixedwood sites and stands in northern Ontario. According to the notice, the notes provide an important foundation for the understanding and management of boreal mixedwoods, covering a range of topics including, site characteristics, silvicultural options, economics, habitat, and disease and pest management considerations.

- MNR stated that the notes do not contain any management direction and therefore do not constitute proposed actions that are environmentally significant under the *EBR*.

ECO Comment

- Acceptable use of an information notice.

Wind Power Development on Crown Land

EBR Registry #: XB05E6005

Description

- MNR posted this notice in March 2005 to inform the public that it had made changes to its policy and procedure for consideration of the disposition of Crown land for wind power testing and development which was posted as a decision notice on the Registry in March 2004 (PB03E6004). The notice stated that the changes were minor in nature, made to improve clarity and consistency, reduce duplication and update literature references and links.

ECO Comment

- Acceptable use of an information notice.
- The ECO wrote to MNR in February 2005, encouraging the ministry to post an information notice on the Registry to inform the public of its review and to indicate when the results would be made public. Later that month, the ministry responded that the review was internal and administrative and that an appropriate posting on the Registry would be made if the review revealed the need for an environmentally significant change. MNR did not post a notice in advance of making revisions. It posted XB05E6005 to inform the public of changes made instead. In principle, the ECO does not object to the use of an information notice to alert the public of minor revisions or clarifications of a policy (provided of course that the revisions are not environmentally significant in nature). The ECO does, however, have concerns about MNR's ongoing revision of policies on this basis (MNR plans to review this policy again in April 2006).
- For further information regarding PB03E6004, please refer to pages 100-103 of this year's annual report.

Ministry of Natural Resources (MNR) – Regulations

Changes to the Ontario Fishery Regulations under the federal *Fisheries Act*

EBR Registry #s:

XB04E3002	-Proposed changes to the angling season for walleye on the Ottawa River
XB04E1014	-Proposed changes on the Winnipeg River System, Kenora District (updated)
XB04E3005	-Proposed changes to the fish sanctuary at the mouth of the Madawaska River
XB04E1011	-Proposed changes to the catch and possession limits, and the angling season for American shad in the Ottawa River
XB04E3007	-Proposed changes to catch limits for yellow perch in Lake St. Francis and the St. Lawrence River (updated)
XB04E6009	-Changes to the walleye sport catch size limit in Northeastern Ontario

Description

- MNR posted these notices throughout the 2004/2005 reporting year to inform the public of changes to, or proposals to change, the Ontario Fishery Regulations, under the *Fisheries Act*. Some notices solicited public input on proposed changes, over a 30-day comment period (e.g., XB04E3002).

Others entailed updates informing the public of decisions made (e.g., XB04E1014). Under s.14(1) of the Ontario Fishery Regulations, the Minister of Natural Resources may vary a close time, fishing quota or limit on the size or weight of fish where a close time, fishing quota or limit on the size or weight of fish is already fixed in respect of an area under these regulations.

ECO Comment
- Acceptable use of information notices.
- The federal *Fisheries Act* and its regulations are not prescribed under the *EBR* for the purpose of giving notice of proposals on the Registry.

Ministry of Natural Resources (MNR) – Instruments

Water Management Plans (WMP)
EBR Registry #s:

XB03E2016	-WMP for the Spanish-Vermillion River Systems – Review of Background Information/Scoping Report
XB04E2008	-WMP for the Kagawong River – Review of Background Information and Draft Scoping Report
XB02E1011	-WMP for Eagle and Wabigoon Rivers – Public Inspection of Approved Plan
XB04E3006	-WMP for Eugenia Falls – Review of Scoping Report
XB03E3005	-WMP for the Mississippi River – Options Development
XB02E1007	-WMP for the Nipigon River – Draft Plan Review
XB03E2008	-WMP for the Abitibi River System – Draft Plan Review
XB02E1008	-WMP for the Aguasabon River – Draft Plan Review
XB03E3004	-WMP for the Bonnechere River – Public Inspection of Approved Plan
XB03E2007	-WMP for the Mattagami River System – Draft Plan Review
XB02E1009	-WMP for the Kaministiquia River – Draft Plan Review
XB02E1010	-WMP for the Seine River System – Public Inspection of Approved Plan
XB04E3008	-WMP for the Elora Mill Generating Station – Review of Draft Water Management Plan
XB05E3001	-WMP for the Homedale Generating Station – Review of Draft Water Management Plan
XB05E3002	-WMP for the Seguin River Watershed – Review of Scoping Report
XB05E2002	-WMP for the Black River – Review of Scoping Report
XB05E2003	-WMP for the River Aux Sables – Review of Draft Plan
XB02E2009	-WMP for the Wahnapitae River – Review of Options Development

Description
- WMPs are instruments issued by MNR. Under the *Lakes and Rivers Improvement Act*, MNR has the authority to order dam owners to prepare management plans in accordance with the Water Management Planning Guidelines for Waterpower.

ECO Comment
- Acceptable use of information notices.
- WMPs are not yet classified as instruments under the *EBR*. The ECO has urged MNR to classify the plans as instruments under O. Reg. 681/94 (the *EBR* classification regulation) as soon as possible. For further information, please refer to page 11 of the ECO's 2002/2003 annual report.
- The ECO is troubled by the delays in prescribing WMPs under the *EBR*, because this undermines the accountability role played by the *EBR* and the ECO.
- For further discussion of the Water Management Planning Guidelines for Waterpower, please refer to pages 108-112 of the 2002/2003 annual report and pages 161-168 of the 2002/2003 Supplement.

Approvals of the Disposition of Land by Conservation Authorities

EBR Registry #s:

XB03E3008	-Grand River Conservation Authority (proposal/decision)
XB03E3007	-Central Lake Ontario Conservation Authority (decision)
XB04E2007	-Nickel District Conservation Authority (decision)
XB04E6012	-North Bay-Mattawa Conservation Authority (proposal)

Description

- MNR posted these notices to inform the public about the disposition of conservation area lands under section 21(2) of the *Conservation Authorities Act (CAA)*. The ministry posted these notices for the purpose of soliciting public comment on proposals or to provide notice of decisions pertaining to land disposals.

ECO Comment

- Unacceptable use of information notices. It is the ECO's opinion that proposals for the disposition of land sales under the *CAA* are prescribed instruments under the *EBR*. Please refer to page 10 of the ECO's 2002/2003 annual report.
- For more information about the consultation benefits afforded the public by the posting of a regular notice, please refer to page 15 of this annual report Supplement.

Cage Culture Aquaculture Licences under the *Fish and Wildlife Conservation Act*

EBR Registry #s:

XB04E2009	-Cold Water Fisheries Inc. – Licence for rainbow trout in Manitoulin District (proposal notice November 2004)
XB04E1018	-Snow Lake Canadien/Fish du Nord Inc. – Licence for rainbow trout, brook trout, arctic char, northern pike, atlantic salmon and white sucker at an open pit mine in the Township of Atikokan (proposal notice November 2004/decision notice January 2005)
XB05E3004	-Aqua-Cage Fisheries Ltd. – Licence for rainbow trout in Eastern Georgian Bay (proposal notice February 2005)
XB05E2010	-Meeker's Aquaculture – Licence for rainbow trout in Manitoulin Island (proposal notice February 2005)
XB05E2011	-Cold Water Fisheries Inc. – Licence for rainbow trout in various locations in Espanola Area (proposal notice February 2005)

Description

- MNR posted these notices throughout the reporting year to consult on proposals to issue licences for cage aquaculture operations under s.47(1) of the *Fish and Wildlife Conservation Act (FWCA)* and, in the case of XB04E2009, to inform the public of decisions made about an aquaculture licence through an update to the original proposal. MNR solicited public comments over a 30-day period on all of its proposals except for the Aqua-Cage Fisheries proposal, for which there was a 37-day comment period.
- Under MNR's new aquaculture policies and procedures, the ministry screens applications for cage aquaculture licences on Crown land as undertakings under the *Environmental Assessment Act* (*EAA*). The operations were screened according to the Class Environmental Assessment for MNR Resource Stewardship and Facility Development Projects and therefore not posted as regular instrument proposals on the Registry.

ECO Comment

- Licences for cage aquaculture on Crown land under s.47(1) of the *FWCA* are prescribed instruments and therefore should be posted on the Registry as instrument proposal notices. If MNR intends to exempt cage aquaculture operations from this requirement by applying the *EAA* exception, it should do so in a transparent manner: by amending O. Reg. 681/94 under the *EBR* (Classification of Proposals for Instruments Regulation).
- For more information about the consultation benefits afforded the public by the posting of a regular notice, please refer to page 15 of this annual report Supplement.
- MNR's August 2004 policy on Issuance of Aquaculture Licence Renewals, Transfers, Amendments, Refusals and Cancellations indicates that the recommended comment period is 45 days.
- MNR failed to indicate what category of *EAA* was required for the Snow Lake Canadien/Fish du Nord Inc. operation. Upon inquiry by ECO staff, MNR indicated that this application was screened under a "Category A" EA, meaning that no further study was required. MNR should ensure that all of its Registry notices related to this Class EA state clearly what screening category an undertaking is subject to.

Class A Licence to Remove More Than 20,000 Tonnes of Aggregate Annually from a Quarry
EBR Registry #: IB02E2002

Description

- MNR posted this notice in June 2004 to advise the public that the ministry had not disposed of an aggregate quarry in Secord Township, District of Sudbury as proposed. In May 2002, the ministry had consulted on its proposal to transfer the quarry to a proponent who had applied for a Class A licence under s.7(2)(a) of the *Aggregate Resources Act* to expand to established quarry. However, the proponent subsequently withdrew the application.
- The notice indicated that the undertaking had been exempted by O. Reg.145/90, an *Environmental Assessment Act* (*EAA*) Exemption Order.

ECO Comment

- Acceptable use of an information notice, provided that this was an instrument issued in accordance with the *EAA*.
- For further discussion of the exemption of instruments for undertakings approved of exempted under the *EAA* from posting regular notices on the Registry (the *EBR* section 32 exemption), please refer to pages 52-59 of the ECO's 2003/2004 annual report.

Ministry of Northern Development and Mines (MNDM) – Instruments

Amendments to Certified Closure Plans
EBR Registry #s:

XD04E1005	-Placer Dome, Campbell Mine, Balmertown
XD04E1011	-Legendary Ore Mining Corp., Alexo Mine, Municipality of Iroquois Falls
XD04E1012	-United Tex-Sol Mines, Clavos Mine, District of Cochrane
XD04E1015	-Porcupine Joint Venture, Hallnor and Broulan Mines, City of Timmons
XD04E1016	-Legendary Ore Mining Corp., Alexo Mine, Municipality of Iroquois Falls
XD04E1020	-Apollo Gold Corporation, Black Fox Mine, Municipality of Black River-Matheson
XD04E1018	-Falconbridge Limited, Montcalm Mine, Montcalm Townships
XD05E1001	-Unimin Canada Limited, Blue Mountain Plant and Tailings Site, County of Peterborough
XD05E1002	-Williams Operation Corporation, Williams Mine, District of Thunder Bay

XD05E1005 -St. Andrew Goldfields Ltd. Stock Mine and Mill Complex, Stock Township

Description

- Under the *Mining Act*, mining companies must submit a closure plan, which proposes rehabilitation measures to be implemented upon the eventual closure of the operation, for filing by MNDM.
- Certified mine closure plan amendments may be ordered by a Director.

ECO Comment

- Acceptable use of information notices. Orders for certified closure plans are posted as proposal notices on the Registry.
- MNDM should have included references to the section of the *Mining Act* under which the amendments were submitted (i.e., section 143(2)) in all notices. The ministry also should have provided more information in the notices on why MNDM is not required to post amendments to certified closure plans as regular notices on the Registry.
- The ECO encourages MNDM to review whether amendments to the *Mining Act* ought to be considered so that these amendments can be posted as regular notices in the future.

Restart of the Northern Empire Mill

***EBR Registry* #:** XD04E1010

Description

- MNDM posted this notice in August 2004 to advise the public that Roxmark Mines Ltd. has given notice to the Director to restart the Northern Empire Mill. Roxmark Mines Ltd. planned to mill about 500 tonnes bulk sample from the Sand River. The company expected to complete the sampling work by December 31, 2004.

ECO Comment

- Acceptable use of an information notice.
- MNDM could have provided greater detail in the notice, including information on when the mill would be restarted and where it is located.

Ministry of the Environment (MOE) – Act

Ministry of Public Infrastructure Renewal's Bill 136 – *Places to Grow Act, 2004*

***EBR Registry* #:** XA04E0018

Description

- MOE posted this notice in late November 2004 on behalf of the Ministry of Public Infrastructure Renewal (PIR) to inform the public that PIR had introduced proposed legislation, Bill 136 – *Places to Grow Act, 2004*, in the Ontario legislature in late October 2004. The notice indicated that if passed, the legislation would put in place the legal framework necessary for the government to designate a geographic area of the province as a growth plan area. The government could subsequently develop a growth plan for that area that would be given legal status through the Act. The notice explained that growth plans would identify where and how that area should grow in the long term, determine infrastructure needs, including public transit and roads, to support that growth and determine which lands require protection.
- MOE posted two other information notices in this reporting period regarding PIR's Places to Grow initiative on behalf of that ministry. In July 2004, MOE posted a notice to inform the public of

opportunities to comment on PIR's *Places to Grow* discussion paper (see XA04E0011 below). In February 2005, MOE posted a notice to inform the public that a proposed growth plan for the Greater Golden Horseshoe region had been drafted and to solicit public comment on it (see XA05E0006 below).

- MOE explained that the notice was posted on PIR's behalf as PIR is not a prescribed ministry under the *EBR*.

ECO Comment

- Under the circumstances, this was an innovative use of the Registry and the ECO commends MOE and PIR.
- There was a 1-month delay in posting this notice from the time the legislation was introduced. The ECO encourages ministries to post notices on the Registry in a timely manner.
- In December 2004, the Environmental Commissioner met with the Minister of Public Infrastructure Renewal to discuss the prescription of the ministry under the *EBR*. Subsequently, the minister agreed that it would be appropriate for PIR to be subject to the *EBR* for legislative and policy proposals related to growth planning and in March 2005 asked MOE to bring forward an amendment under O. Reg. 73/94 to prescribe the ministry for such purposes.
- For further information on PIR's Places to Grow initiative, please refer to page 53 of this year's annual report.

Ministry of the Environment (MOE) – Policies

Amendment to a Guideline for O. Reg. 127/01 under the *Environmental Protection Act*

EBR Registry #: XA04E0006

Description

- MOE posted this notice in May 2004 to inform the public that it had amended its "Step by Step Guideline for Emission Calculation, Record Keeping and Reporting for Airborne Contaminant Discharge" to clarify reporting requirements for industries subject to O. Reg. 127/01 under the *Environmental Protection Act*. The guideline was amended to clarify requirements, such as for record keeping. MOE also added a section to the guideline outlining new group thresholds for the reporting of several groups of substances (e.g., glycol ethers) to address stakeholder concerns with the low degree of confidence in the accuracy of emissions data for individual substances with low emissions. Amendments were to be effective immediately.
- The notice indicated how the public could attain copies of the amended document.
- MOE stated that the changes were administrative in nature and therefore did not warrant a regular proposal notice on the Registry.

ECO Comment

- Acceptable use of an information notice.
- MOE could have provided a link to the amended document.

Recent Activities Related to Air Standards

EBR Registry #: XA04E0007

Description

- MOE posted this notice in June 2004 to provide the public with an overview of the ministry's work developing a new framework for regulating air pollution. The notice explained that the ministry had recently developed three proposals: a proposed position paper to update Ontario's regulatory framework for local air quality; a proposed guideline for air dispersion modeling; and a proposed guideline for the implementation of air standards in the province. The notice also indicated the status (i.e., proposed information draft, proposed rationale document or decision) of air standards for various substances. A link to the ministry's website providing further information regarding each of the activities, including opportunities for public input through Registry proposal notices, was included at the end of the notice.

ECO Comment

- The ECO commends MOE's use of an information notice for this purpose. This type of notice plays an important role by providing a common point of access for various separate, yet related, proposals.
- For further information regarding the ministry's air activities, please refer to pages 55-58 of this year's annual report.

Ontario's Clean Air Action Plan

***EBR Registry* #:** XA04E0008

Description

- MOE posted this notice in June 2004 to inform the public of the release of its report "Ontario's Clean Air Action Plan: Protecting Environmental and Human Health in Ontario." The notice indicated that the document, which comprises Ontario's implementation plan for the Canada-wide Standards (CWS) for particulate matter and ozone, provides an overview of the ministry's approaches and actions taken to address smog in the province. The document organizes the discussion of Ontario's approach under the headings of: key regulatory initiatives, government leadership, incentives, public education and outreach, encouraging non-regulatory commitments, and capacity building. The Canadian Council of Ministers of the Environment, which includes the federal government and 13 provinces, committed to CWSs for particulate matter and ozone in June 2000.
- The notice stated that a regular proposal notice on the Registry was not required as the document is a status report which does not issue any new policy proposals.

ECO Comment

- Acceptable use of an information notice. MOE has used the Registry to consult with the public in the past on many of the activities described in the document.

Ministry of Public Infrastructure Renewal's Places to Grow Initiative

***EBR Registry* #s:** XA04E0011 and XA05E0006

Description

- MOE posted the first notice (XA04E0011) on behalf of the Ministry of Public Infrastructure Renewal (PIR) in July 2004 to inform the public of opportunities to comment on PIR's "Places to Grow" discussion paper. Developed in consultation with a wide range of stakeholders, Places to Grow outlines the government's proposed long-term approach to dealing with growth in the Greater Golden Horseshoe region of Ontario. The notice indicated that PIR was inviting Ontarians to submit comments on the discussion paper over a 60-day period and provided a public information session schedule. The notice was subsequently updated in August 2004 to include information about an additional information session.
- In late November 2004, MOE posted a notice to inform the public that PIR had introduced proposed legislation, Bill 136 – *Places to Grow Act, 2004,* in the Ontario legislature in late October 2004 (see XA04E0018 on page 27, above).

- In February 2005, MOE posted a second information notice (XA05E0006) on behalf of PIR to inform the public that PIR's proposed "Growth Plan for the Greater Golden Horseshoe" had been drafted and to solicit public comment on the proposed plan during a 2-month window beginning February 16, 2005. The notice indicated that the draft plan included policies related to where and how to grow, infrastructure to support growth, the protection valuable lands and implementation. The notice indicated that the plan would be given legal authority under the proposed *Places to Grow Act.*
- MOE explained in both notices that they were posted on PIR's behalf as PIR is not a prescribed ministry under the *EBR*.

ECO Comment

- Under the circumstances, this was an innovative use of the Registry and the ECO commends MOE and PIR.
- In December 2004, the Environmental Commissioner met with the Minister of Public Infrastructure Renewal to discuss the prescription of the ministry under the *EBR*. Subsequently, the minister agreed that it would be appropriate for PIR to be subject to the *EBR* for legislative and policy proposals related to growth planning and in March 2005 asked MOE to bring forward an amendment under O. Reg. 73/94 to prescribe the ministry for such purposes.
- For further information on PIR's Places to Grow initiative, please refer to page 53 of this year's annual report.

Framework for a Land Disposal Restriction Regulation for Ontario

EBR Registry #: XA04E0010

Description

- MOE posted this notice in July 2004 to provide the public with information regarding the scope of its land disposal restriction (LDR) program for hazardous wastes (i.e., a program to ban the land disposal of hazardous wastes unless they are treated or meet specific treatment requirements). The notice indicated that the ministry had posted a policy decision notice on the Registry in March 2004 indicating that it would move forward with a land disposal restriction program which would be implemented through a regulation. In its March 2004 notice, MOE committed to consulting on the draft regulation. In its July 2004 information notice, MOE stated that it was using this first notice to outline the scope of an LDR program given the complexity of the program. The information notice reiterated MOE's commitment to post a draft regulation for full public consultation at a later date. The notice solicited comments over a 9-day period.

ECO Comment

- The ECO believes that MOE should have posted a regular policy proposal notice on the Registry rather than use an information notice to signal its intentions. MOE specifically stated in the notice that it believed that public comment on the framework document would be helpful to assist the ministry as it drafts a LDR regulation. MOE should have therefore allowed for a public comment period lasting at least 30-days even though it planned to post a regular proposal notice on the Registry for consultation on a draft regulation in the future.
- A number of stakeholders contacted the ECO to express concern and frustration about this use of the Registry.
- MOE posted a draft regulation on the Registry as a regular proposal notice in September 2004 (RA04E0016).
- For further information on MOE's proposed LDR program, please refer to pages 97-100 of this year's annual report.

Final Discussion Document of the Industrial Pollution Action Team
EBR Registry #: XA04E0014

Description

- MOE posted this notice in August 2004 to inform the public that the Industrial Pollution Action Team (IPAT) had submitted its final report to the Minister of the Environment and to solicit public input on the report's recommendations. The IPAT was struck in April 2004 in order to examine the causes of industrial spills and dangerous air emissions in the province and to recommend to the government how such incidents could be prevented. The minister requested in IPAT's terms of reference that the team to perform a number of tasks including: identify the weaknesses and gaps in the current approaches to spills in Ontario; determine possible solutions; and assess the health, environmental, community and business impacts for each option. The notice listed the IPAT members, outlining their affiliations and educational backgrounds.

ECO Comment

- Acceptable use of an information notice.

Review of the National Pollutant Release Inventory
EBR Registry #: XA04E0013

Description

- MOE posted this notice in August 2004 to advise the public that a summary of the report, "A Comprehensive Review of the Differences between the NPRI [National Pollutant Release Inventory] and O. Reg. 127/01," was available on Environment Canada's (EC) NPRI website. The report, commissioned by the EC/MOE Joint Working Group on the Harmonization of the NPRI and the Ontario Airborne Discharge Monitoring and Reporting Regulation (O. Reg. 127/01), provides information, identifies differences (38 in total which are grouped into five different categories) and highlights opportunities for the harmonization of the two industrial emissions reporting regimes. The notice provided a link to the document and advised the public of the availability of a response by the joint working group on the NPRI website as well.

ECO Comment

- Acceptable use of an information notice.
- In November 2003, the ECO encouraged MOE to post an information notice regarding this report. For further information, please refer to page 4 of the Supplement to the ECO's 2003/2004 annual report.

Improvements to Ontario's Environmental Assessment Process
EBR Registry #: XA04E0015

Description

- MOE posted this notice in September 2004 to advise the public that the Ontario government had struck an advisory panel to advise on ways of revitalizing, rebalancing and refocusing Ontario's environmental assessment (EA) process. The panel was issued a Terms of Reference (TOR) which mandated it to: identify key impediments to obtaining timely approvals for projects subject to the EA process, such as waste, transit/transportation and cleaner energy and to identify improvements to the existing process in areas such as public participation and monitoring. The notice listed the panel members and their affiliations and welcomed public input on improvements for a comment period exceeding 30 days.

- MOE updated the information notice in April 2005 to announce the completion of the advisory panel's report and to provide public access to it.

ECO Comment

- Acceptable use of an information notice.
- The April 2005 information notice will be reviewed in the Supplement to the ECO's 2005/2006 annual report.
- For further information, please refer to pages 164-165 of this year's annual report.

Smaller Drinking Water Systems: Advisory Council Report
EBR Registry #s: XA04E0016 and XA05E0002

Description

- MOE posted a notice (XA04E0016) in October 2004 to inform the public that the Advisory Council on Drinking Water Quality and Testing Standards would be conducting consultations regarding issues associated with the application of O. Reg. 170/03 (Drinking-Water Systems) to smaller private water systems. The council, struck by the minister in May 2004, was directed to review the issues and to develop recommendations which meet two key objectives: the health and safety of Ontarians (i.e., keeping in mind the ministry's commitment to implement all of Commissioner O'Connor's recommendations regarding drinking water) and the need for implementation which is timely, effective and clearly understood. A preliminary review conducted by the council had determined that, in its application to smaller private systems, the regulation was too costly, complex and not well understood.
- The notice indicated that the council was interested in hearing from four main groups: scientific/technical drinking water experts; parties concerned about the quality of drinking water; parties responsible for compliance and delivery of quality drinking water; and the general public. The notice detailed the public consultation locations and schedule for the 12 planned sessions.
- In February 2005, MOE posted a second information notice (XA05E0002) which provided a link to a summary of the feedback received by the council as a result of its consultations.
- In March 2004, the minister announced that the report of the council had been completed. In April 2005, MOE posted an information notice (XA05E0007) about the report, providing a link to it. The report's key recommendations include transferring responsibility from MOE to the public health units for inspecting smaller private systems and conducting case-by-case risk evaluations to establish testing and treatment requirements.

ECO Comment

- Acceptable use of information notices.
- For further information on O. Reg. 170/03, please refer to page 89 of the Supplement to the ECO's 2003/2004 annual report.

Canada-wide Standard: Dioxin and Furan Emissions from Conical Municipal Waste Combustors
EBR Registry #: XA03E0008

Description

- This notice, posted by MOE in November 2004, constitutes an update to a notice posted in June 2003 which informed the public of the ministry's plans to adopt a "Canada-wide Standard" (CWS) for dioxin and furan emissions from conical municipal waste combustors, developed by the Canadian Council of Ministers of the Environment. Dioxins and furans are released into the environment as a result of the burning of municipal waste in the combustors. Conical waste combustors are unique to

Newfoundland-Labrador where over 40 exist. The proposed standard would require the phase out of the operation of conical waste combustors in Newfoundland-Labrador by 2008 and prohibit the establishment and operation of new facilities anywhere in Canada.

- The November 2004 update informed the public that Ontario and other Canadian jurisdictions had endorsed the standard. According to a document provided as a link, endorsement occurred in November 2003. While there are no conical municipal waste combustors in Ontario, the ministry nonetheless amended Guideline A-7, which sets out Ontario's emission standards for municipal waste, to explicitly state that such facilities are not permitted in the province.

ECO Comment

- Acceptable use of an information notice.
- MOE should have indicated in the notice itself when the standard was endorsed. There was a 1-year delay in posting this update after the standard was endorsed in November 2003. The ECO encourages MOE to update its Registry notices in a timely manner.

Source Water Protection: Reports of the Technical Experts and Implementation Committees

EBR Registry #s: XA04E0021 and XA04E0022

Description

- MOE posted the two information notices in December 2004 to alert the public to the availability of two reports related to source water protection planning: a report by the Technical Experts Committee (TEC) called "Watershed-Based Source Protection Planning: Science-based Decision-making for Protecting Ontario's Drinking Water Resources: A Threats Assessment Framework" (the subject of XA04E0022) and a report by the Implementation Committee (IC) called "Watershed Based Source Protection" (the subject of XA04E0021).
- The ministry provided access to the reports through the notices and solicited public input over a 2-month period (although XA04E0022 did not convey in a clear and upfront manner that MOE was soliciting comments on the TEC report). The notices indicated that the ministry would consider public comments on the reports, as well as comments already received on the draft source protection planning legislation and the advice of its two committees in developing source water protection legislation, which it expected to introduce in 2005.

ECO Comment

- MOE provided a useful service by providing public access to and soliciting input on these key documents.
- MOE should have described, in an upfront and clear manner, the consultation opportunities available for the TEC report in XA04E0021, as it did in its notice for the IC report in XA04E0022. The ECO contacted MOE in January 2004 to encourage the ministry to correct a typographical error in XA04E0021. As of April 2005, MOE had not corrected the error. The ECO encourages the ministry to ensure the quality of its Registry notices.
- The ECO plans to review and report on the source water protection legislation once it is passed.

Drive Clean Emissions Analysis Reports

EBR Registry #s: XA04E0017 and XA05E0004

Description

- MOE posted the first information notice (XA04E0017) in December 2004 to announce the release of its report "Drive Clean Program Emissions Benefit Analysis and Reporting – Heavy Duty Diesel

Vehicles" and to provide public access to the report through a link to the home page of MOE's Drive Clean website.

- The second information notice (XA05E004), posted in March 2005, announced the release the report "Drive Clean Program Emissions Benefit Analysis and Reporting – Light Duty Vehicles and Non-Diesel Heavy Duty Vehicles," providing public access to it through a link to the home page of MOE's Drive Clean website.
- The reports, produced by an independent consultant, were commissioned to estimate the reductions in pollutant emissions attributable to the Drive Clean program for heavy duty diesel vehicles for the years 2000 to 2002 (the subject of XA04E0017) and to the program for light duty and non-diesel heavy duty vehicles for the years 1999 to 2003 (the subject of XA05E0004). The emissions reductions calculated for the second report were based on a new computer model.

ECO Comment

- Acceptable use of information notices. The ECO encouraged the ministry to provide notice of its emissions reductions reports through information notices posted on the Registry. For further information, please refer to page 220 of the Supplement to the ECO's 2003/2004 annual report.
- The notices could have provided direct links to the reports, instead of to the Drive Clean homepage, in order to facilitate ease of access.

Update on Ontario's Environmental Leaders Program

EBR Registry #: XA04E0020

Description

- MOE posted this notice in December 2004 to inform the public that it had signed two agreements under Ontario's Environmental Leaders Program (OEL) – one with the Canadian Chemical Producers' Association (CCPA) in September 2003, the second with Steelcase Canada Ltd. in September 2004.
- The ministry had employed a regular policy proposal notice (PA02E0004) in April 2002 to announce and consult on the program in its pilot stage (then known as Ontario's Cooperative Agreements) and on the ministry's proposal to sign sector level agreements with the Automotive Parts Manufacturers' Association (APMA). In the notice, the ministry also committed to consulting on an agreement CCPA. The ministry's March 2003 decision notice outlined MOE's decision vis-à-vis the program. However, it did not indicate whether a decision had been made regarding the APMA agreement.

ECO Comment

- While the information notice does provide useful public information regarding the finalized agreements, the ECO believes that MOE should have consulted on its decision to sign the agreement with Steelcase Canada Ltd. and the CCPA, as expressed in a letter from the ECO to the ministry in November 2004. The ECO also indicated that the ECO would prefer MOE to update the policy decision notice (PA02E0004) to reflect its decision regarding the APMA agreement. The ECO encourages MOE to post all future sector-level and facility-specific agreements on the Registry as regular notices. For further discussion of the ECO's letter and the ministry's response, please refer to pages 9-10 of this Supplement.
- For further information regarding PA02E0004 and the ECO's expectations regarding the use of the Registry to announce and consult on aspects of the OEL program, please refer to page 71 of the Supplement to the ECO's 2003/2004 annual report.

Waste Electronic and Electrical Equipment: Minister's Request for Waste Diversion Program

EBR Registry #: XA04E0027

Description

- MOE posted this notice on December 31, 2004 to provide public access to the Minister of the Environment's letter to Waste Diversion Ontario (WDO) requesting that the organization develop a waste diversion program for waste electronic and electrical equipment (WEEE). The minister provided some direction on the content of the program and outlined priorities for addressing at least 54 kinds of WEEE, including household appliances, information technology equipment and consumer electronics. The minister also requested that the WDO, in cooperation with the Industry Funding Organization for WEEE, prepare a study on the state of WEEE management in Ontario for submission to the minister by June 1, 2005.
- MOE designated WEEE under the *Waste Diversion Act (WDA)* on December 23, 2004, after consulting through a regular notice on Registry in October 2004 (RA04E0019).

ECO Comment

- Acceptable use of an information notice.
- For further information on the issue of electronic waste diversion, please refer to page 180 in the ECO's 2003/2004 annual report. For further information on the *WDA*, please refer to page 66 of the Supplement to the ECO's 2002/2003 annual report.

Report of the Experts Panel on Sound-Sorb

EBR Registry #: XA05E0005

Description

- MOE posted this notice in February 2005 to alert the public to the release of its "Report of the Experts Panel on Sound-Sorb" and to solicit public input on the report over a 90-day comment period ending May 26, 2005. Sound-Sorb is a material comprised of paper fibre biosolids, produced from the waste from paper recycling processes and soil. The material is used to build sound and bullet attenuation berms which are used at gun clubs in Ontario. In its review, the expert panel examined three issues: (1) whether Sound-Sorb poses a threat to human health and/or the environment; (2) the degree of any threat and possible mitigation measures; and (3) whether there are any sites across the province which may be more sensitive to the use of the material.

ECO Comment

- Acceptable use of an information notice.
- For further information on MOE's policy regarding Sound-Sorb, please refer to page 150 of the ECO's 2002/2003 annual report.

Ministry of the Environment (MOE) – Regulations

Administrative Fees for Applications for Permits to Take Water

EBR Registry #: XA04E0024

Description

- MOE posted this notice in December 2004 to announce that it would be introducing administrative fees for permit to take water (PTTW) applications, effective April 1, 2005 and would be improving service delivery, including faster processing times. The ministry indicated that the fees charged would reflect the classification of applications as outlined in the draft PTTW manual – $750 for Category 1 and for Category 2 (scoped), and $3,000 for Category 3 (detailed). The draft PTTW manual was posted on the Registry for a 45-day comment period on December 14, 2004 and the decision was posted on April 14, 2005 (PA04E0036).

- The notice stated that the amendment was fiscal and administrative in nature and that it was therefore exempt from the requirement to post a regular notice on the Registry under s.16(2) of the *EBR*.
- MOE did not indicate that the change was implemented by a change to a regulation.

ECO Comment

- Acceptable use of an information notice.
- On March 8, 2005, the government announced in a press release that farmers would be exempted from the new administrative fee requirement. No update was posted to amend the PTTW fees information notice.
- For further information on the PTTW program, please refer to pages 116-120 of this year's annual report.

Ministry of the Environment (MOE) – Instruments

Certificate of Approval for the Proposed Construction of a Sewage Collection System

EBR Registry #: XA04E0005

Description

- MOE posted this notice in April 2004 to inform the public that it was proposing to approve the construction of a sewage collection system in King City, York Region which would comprise: a system of local sewers; five local pumping stations; one regional pumping station; and a forcemain. The notice stated that King City is one of the largest communities in Ontario still serviced by private on-site/tile field systems and that there are concerns that the systems currently in place are failing. MOE explained that the minister had turned down a request for an individual environmental assessment only after requiring the municipality to undertake additional work to assess the construction impacts of the proposed undertaking and to size the sewage connection in accordance with the servicing requirements outlined in an official plan amendment. The notice solicited comments on the proposal over a 6-day period. The notice also informed the public of where the certificate of approval application and a compliance report produced by York Region, outlining how the potential impacts can be mitigated, could be viewed.
- The ministry subsequently updated the notice in August 2004 to inform the public that the ministry had approved the C of A. Forty-eight sets of comments – both in favour of and opposed to the proposed approval – were submitted by members of the public during the 6-day period. MOE briefly summarized the main concerns in the notice and stated that they were considered in the decision-making process. According to the ministry, the main concerns about the approval were addressed through the official plan amendment and through York Region's compliance report to MOE.
- The planned sewer system is an undertaking which is subject to the requirements of the *Environmental Assessment Act (EAA)*.

ECO Comment

- Acceptable use of an information notice. Due to s.32 of the *EBR*, MOE is exempt from having to post notices for these types of Cs of A are exempted from being posted as proposals on the Registry.
- For further information on the King City sewer system, please refer to pages 254-258 of this annual report Supplement.
- For further discussion of the exemption of instruments for undertakings approved under the *EAA* from posting regular notices on the Registry (the *EBR* section 32 exception), please refer to pages 52-59 of the ECO's 2003/2004 annual report.

Deloro Mine Site Arsenic Remediation
EBR Registry #: XA04E0012

Description

- MOE posted this notice in October 2004 to advise the public that would be taking steps to consolidate three permits to take water (PTTW) for the Deloro Mine site into a single permit to be held by MOE. The permits, one of which was held by the Ontario Clean Water Agency (OCWA), allow for water takings for the remediation of arsenic-contaminated groundwater at the former mine site to reduce loadings to the local watershed. MOE stated that the consolidation would simplify the permit renewal and amendment process for ongoing operations at the site.
- MOE stated that the amendment was administrative in nature and did not alter the total permitted water takings.
- MOE posted its draft clean up plan for the Deloro Mine on the Registry in November 2004 (PA04E0044).

ECO Comment

- Acceptable use of an information notice.
- In 1997, MOE committed to posting notice of any proposals to issue certificates of approval (Cs of A) related to the Deloro Mine on the Registry. (For further information, please refer to page 238 of the ECO's 1998 annual report and page 29 of the ECO's 1997 annual report).
- MOE should have stated in the Registry notice when the original Cs of A were issued.

Re-instatement of Provisional Certificate of Approval for a Waste Disposal Site
EBR Registry #: XA05E0003

Description

- MOE posted this notice in February 2005 to inform the public that it was considering reinstating a certificate of approval (C of A) for a waste disposal site in the City of Vaughan and to solicit comments on the proposal over a 30-day period ending March 10, 2005.
- The notice provided a detailed history of events at the site explaining that a fire had started at the site, then owned by Rail Cycle Inc., in October 2004. To address the fire, MOE issued a Director's Order, requiring the removal and disposal of all excess waste from the site, and suspended the facility's C of A. The Order and the suspension were the subject of an emergency exception notice posted on the Registry (IA04E1527) in late October 2004. Then, in November 2004, a second fire started at a different location on the site. The ministry issued a second Director's Order after it determined that Rail Cycle Inc. was not in compliance with the October 2004 order. The ministry also gave notice, under s. 147 of the *Environmental Protection Act*, of its intention to cause things required by the second order to be done, as described in a second emergency exception Registry notice (IA05E0108) posted in February 2005. MOE contracted Waste Excellence Corporation (WEC) to carry out the clean up. Upon completion of the clean-up in December 2004, WEC expressed an interest in purchasing, upgrading and operating the facility and requested that MOE consider reinstating the C of A. WEC outlined a number of conditions that it would be willing to commit to, including conducting public consultation within the local community.
- MOE updated the notice in March 2005 to inform the public that the comment period had been extended to April 12, 2005 and to indicate that a second public meeting, with participation from WEC and MOE, had been scheduled.

- Two days prior to posting its February 2005 information notice, MOE posted a regular proposal notice on the Registry (IA05E0090) requesting public input on proposed amendments to the C of A for the waste facility.

ECO Comment

- It is not clear why MOE did not post one regular policy proposal notice on the Registry to consult jointly on its proposal to reinstate the C of A for the facility under WEC's ownership and its proposal to amend the C of A.
- For further information on the Director's Orders, please refer to the review of Registry postings IA04E1527 and IA05E0108 in the Exception Notices section of this Supplement, on page 45.

Ministry of Transportation (MTO) – Policy

Environmental Management for the Ministry of Transportation – Overview

EBR Registry #: *XE02E4550*

Description

- In April 2004, MTO updated this notice, first posted in November 2002, to inform the public that the ministry had recently revised an information document, entitled "Environmental Management for the Ministry of Transportation – Overview," related to its Environmental Standards Project (ESP) and to solicit public input over a 45-day comment period. The notice outlined the four key objectives of the ESP: Environmental Protection Requirements; Environmental Best Practices; Measures for Environmental Performance; and an Environmental Management System. The notice explained when the ministry expected to post notices of key components of the project on the Registry for public comment, as described in the information document. The notice indicated that one component – "Environmental Protection Requirements for Transportation Planning and Highway Design, Construction, Operation and Maintenance" – was posted concurrently as a regular policy proposal notice for comment (PE04E4551).
- The notice stated that the information document does not represent policy, but rather describes policy that is to be developed through the ESP.

ECO Comment

- Acceptable use of an information notice.
- For further information on the November 2002 version of this notice, please refer to pages 21-22 of the Supplement to the ECO's 2002/2003 annual report.
- For further information on MTO's environmental policy for transportation, please refer to pages 107-111 of this year's annual report.

Environmental Assessment Terms of Reference

EBR Registry #s:

XE04E3601	-Highway 407 East
XE04E4513	-Detroit River International Crossing

Description

- MTO posted these notices to alert the public to the availability of Environmental Assessment (EA) Terms of Reference (TOR) and to inform the public that MOE would be accepting public input over the following approximately 30-day period. Both notices explained that the EA study would commence only after the Minister of the Environment had approved the TOR.

ECO Comment

- Unacceptable use of information notices. In 2001, the ECO informed ministries prescribed under the *EBR*, including MTO, of its opinion that a proposed TOR developed by a prescribed ministry meets the definition of a policy under the *EBR* and therefore a regular Registry notice would be appropriate.
- For more information about the consultation benefits afforded the public by the posting of a regular notice, please refer to page 15 of this Supplement.

Ministry of Health and Long-Term Care (MOHLTC) – Policy

West Nile Virus – Preparedness and Prevention Plans for 2003, 2004 and 2005

***EBR Registry* #s:** XG04E0001 and XG05E0001

Description

- MOHLTC posted the first information notice (XG04E0001) in July 2004 to provide notice of and access to documents entitled "West Nile Virus – Preparedness and Prevention Plan for Ontario" for 2003 and 2004. The plans are technical reference documents which are designed to assist local Medical Officers of Health in conducting risk assessments of the conditions pertaining to the West Nile virus (WNv), as required by O. Reg. 199/03 under the *Health Protection and Promotion Act*. The notice indicated that MOHLTC conducted meetings with a select group of Ontario organizations and citizens on the proposed plans in February 2003 and February 2004. The notice also stated that the ministry intended to post the relevant parts of the proposed 2005 plan as a regular policy proposal notice on the Registry for consultation.
- MOHLTC posted the information notice after the ECO observed that the ministry had failed to use the Registry to announce and consult on its WNv plans and communicated this to the ministry in May 2004. In a letter to the ministry, the ECO outlined its position that the WNv plans are environmentally significant and therefore should be posted on the Registry as regular policy proposal notices for public consultation. In its response of June 2004, MOHLTC acknowledged the environmental significance of the plans and stated that relevant parts of the 2005 WNv plan would be posted as a regular proposal notice. The ministry also indicated that it would use an information notice to inform the public about the 2003 and 2004 plans, which had already been finalized at that time.
- In February 2005, MOE posted the second information notice (XG05E0001) to announce the release of its 2005 WNv plan. The notice invited interested organizations to participate in stakeholder meetings later that month and provided contact information.

ECO Comment

- MOHLTC took steps to rectify its failure to post a regular proposal notice on the Registry regarding the 2003 and 2004 WNv plans. However, the ministry should have posted the 2005 WNv plan as a regular notice as it committed to do. On March 3, 2005, the ECO contacted MOHLTC to inquire as to why an information notice was used yet again to announce the 2005 plan. The ministry acknowledged its past commitment and indicated that it would look into posting a regular policy proposal notice. The ministry indicated that it would respond to the ECO once it determined how to address the situation.
- In July 2005, MOHLTC advised the ECO that it was "agreeable to posting the 2005 Plan as a 'policy proposal,' with the provision that the 2005 Plan has already been approved." The ministry suggested that any comments received could be considered in drafting the 2006 plan. In August 2005, the ECO advised the ministry that, as the 2005 Plan had already been finalized, we would prefer that it post a policy proposal notice pertaining to the draft 2006 WNv plan on the Registry in early February 2006,

concurrent with stakeholder consultations on the draft plan. The public would then have the benefit of reviewing and commenting on any new information and lessons learned from the 2005 WNv season.

- For further information on the interaction between the ECO and MOHLTC regarding the use of the Registry in relation to WNv plans, please refer to page 8 of the Supplement to the ECO's 2003/2004 annual report.
- The ministry should have provided a link to its 2005 West Nile virus plan in XG05E0001.

Environmental Commissioner of Ontario (ECO) – Policy

Discussion Paper for the 10-Year Review of the *Environmental Bill of Rights*
EBR Registry #: XQ04E0002

Description

- MOE posted this notice on behalf of the ECO in November 2004 to provide an update on the 10-year review of the *Environmental Bill of Rights (EBR)* and to invite interested individuals and groups to provide additional input, over a 2-month comment period ending January 10, 2005, into a discussion paper. The notice described the consultations that had occurred and the reports produced in the review process to date. It explained that the purpose of the ECO's discussion paper – "Looking Forward: The Environmental Bill of Rights" – was to synthesize many of the comments and suggestions received and to offer suggestions on how to proceed. The notice posed a number of questions for consideration and indicated that an independent consulting firm would receive the questions on an arms-length basis on behalf of the ECO in order to keep responses confidential.
- The notice was updated in December 2004 to provide information on how the public could submit comments electronically and to extend the comment period to January 24, 2005.

SECTION 3

ECO REVIEWS OF EXCEPTION NOTICES

SECTION 3: ECO REVIEWS OF EXCEPTION NOTICES

Use of Exception Notices

In certain situations, the *EBR* relieves prescribed Ontario ministries of their obligation to post environmentally significant proposals on the Registry for public comment.

There are two main instances in which ministries can post an "exception" notice to inform the public of a decision and explain why it was not posted for public comment. First, ministries are able to post an exception notice under section 29 of the *EBR* when the delay in waiting for public comment would result in danger to public health or safety, harm or serious risk to the environment, or injury or damage to property (the "emergency" exception). Second, ministries can post an environmentally significant proposal as an exception notice under section 30 of the *EBR* when the proposal will be or has already been considered in another public participation process that is substantially equivalent to the requirements of the *EBR* (the "equivalent public participation" exception).

Quality of Exception Notices

Ministries should strive to ensure that notices use plain language and precise explanations, and provide an adequate level of detail. Ministries should ensure that all notices include the name, address, phone number and fax number of a ministry contact person. Ministries should also strive to post exception notices promptly after decisions are made. The ECO has provided this advice in a guidance document to the ministries in 1996.

Emergency Exceptions under Section 29(1) of the *EBR*

Ministry of the Environment (MOE) – Regulations

Designation of Parts of the Territorial District of Algoma under the *Aggregate Resources Act*
EBR Registry #: RB04E6011

Description

- MNR posted this emergency exception notice in August 2004 to inform the public that it had designated parts of the Territorial District of Algoma under the *Aggregate Resources Act (ARA)* by issuing O. Reg. 209/04 which amended O. Reg. 244/97 under the Act.
- MNR stated that the ministry did not post a regular proposal notice as the situation constituted a risk to the environment and therefore, an emergency under the *EBR*. According to the ministry: "Widespread prior public notification of a regulation such as this could result in aggregate operators taking steps to be considered 'established' prior to passage of the regulation in an attempt to avoid complying with all of the requirements for new operations under the *ARA*." MNR explained that aggregate operations which are already legally established at locations which are situated within territories that become designated under the *ARA* are subject to a more limited set of requirements, including environmental requirements.

ECO Comment

- MNR did not do an adequate job of explaining in the notice why this situation constituted an emergency. The ministry did not provide any evidence that aggregate operations would actually attempt to become established before the area became designated. Moreover, there is precedent for consulting using the Registry on regulations to designate territory under the *ARA*. In 1997-1998, when MNR was considering subjecting other parts of the Territorial District of Algoma and the Territorial District of Sudbury to the Act, the ministry posted a regular notice, seeking public comment, on the Registry. The decision to designate the two districts, made in 1998, was also subject to direct consultations involving local municipalities and aggregate producers.

- For further information regarding this decision please refer to pages 89-91 in this year's annual report and pages 105-116 in the Supplement.

Ministry of the Environment (MOE) – Instruments

Storage of Paper Fibre Wastes near a Wetland

EBR Registry #: IA04E0649

Description

- MOE posted this notice in April 2004 to inform the public that it had issued s.17 and s.18 *Environmental Protection Act* Orders, for remedial work and preventive measures to Courtice Auto Wreckers Limited. The Orders required the company to immediately stop depositing paper fibre bio-solids (PFB) on a Flamborough property; remove all deposited material from the site in the near future; and retain professionals to assess the impacts of PFB on ground and surface water and on the sites' soil and vegetation. The company had deposited over 70,000 tonnes of PFB, sand and compost on the site in order to construct a berm for use at an on-site private shooting range.
- Effluent from the berm's drain pipe, sampled by MOE staff in January and February 2004, was found to be acutely toxic, containing lead, high levels of suspended solids, fecal streptococci and exceeding Provincial Water Quality Standards for *E. coli*, pH and a number of heavy metals. Results from samples collected in March 2004 were pending at the time the Orders were issued. Ministry staff determined that the berms were constructed near a cold water fishery and in an environmentally sensitive and provincially significant area during inspections in March 2004.
- The ministry indicated that an emergency exception notice was warranted as delays are very likely to cause further impairment or adverse impact to the environment.

ECO Comment

- Acceptable use of an emergency exception notice.
- The notice should have stated when the Order was issued.
- This is the same company that produces Sound-Sorb. For further information please refer to page 150 of the ECO's 2002/2003 annual report.

Storage of Deadstock at a Rendering Plant

EBR Registry #: IA04E0604, IA04E1112, IA04E1275

Description

- In April 2004, MOE posted an emergency exception notice (IA04E0604) relating to two temporary Certificates of Approval (C of A) for air for Maple Leaf Foods' Rothsay rendering plant in Dundas. One C of A allowed for the collection and storage of deadstock at the plant. The second C of A allowed for an increase in the amount of deadstock to be received at the site as raw material to up to 500 tonnes per week between April 12 and 25th. Cs of A permitting the collection and storage of deadstock on a temporary basis had already been issued to Maple Leaf Foods in July 2003 (IA03E0974, at the company's Dundas *and* Moorefield plants), November 2003 (IA03E1720, at the Dundas plant only) and February 2004 (IA04E0161, at the Dundas plant only).

- The April 2004 notice indicated that there was an immediate risk that large numbers of dead animals unwanted by the rendering industry would be buried or improperly disposed. The bovine spongiform encephalopathy (BSE) crisis in Britain and the single case of BSE in Alberta in May 2003 had resulted in trade embargoes on ruminant products and a crisis situation for the markets for all beef products. The notice indicated that the ministry used the emergency exception notice as the delay in giving notice to the public and allowing for public participation would result in Rothsay no longer accepting ruminant deadstock. According to MOE, "If the company is not able to obtain the necessary approvals in a timely manner, they may be forced for business reasons to refuse to accept ruminant deadstock."
- The notice also indicated that the proponent had applied for a permanent C of A for the Dundas plant and provided a link to that proposal notice of December 2003 (IA03E1811).
- In August 2004, MOE issued a fifth emergency exception notice (IA04E1112) to inform the public that an additional C of A allowing the company to accept 500 tonnes of raw deadstock per week, on a temporary basis starting May 1, 2004, had been issued. In September 2004, MOE issued a sixth emergency exception notice (IA04E1275) indicating that the expiry date had been extended once again, effective August 27 to December 30, 2004.
- In November 2004, the ECO encouraged MOE to make a decision regarding its proposal to issue a permanent C of A to Maple Leaf Foods for its Dundas plant and to update the proposal notice to reflect its decision (IA03E1811). In January 2005, MOE updated the notice to reflect its decision to issue a three-year, interim C of A to the company to allow it to: (1) accept 500 tonnes per week of deadstock as raw material; (2) accept incidental amounts of food and agricultural waste as raw material; and (3) use tallow and yellow grease as fuel in process boilers.

ECO Comment

- The ECO is pleased that MOE issued a three-year interim C of A to Maple Leaf Foods thereby obviating the need for the ministry to continue issuing temporary emergency Cs of A and posting emergency exception notices on the Registry which do not allow for public input.
- MOE did not provide effective and/or expiry dates for the temporary Cs of A in all of its notices posted during this fiscal year. There was more than a three-month delay between the effective date of one C of A and the date on which the notice about it was posted (IA04E1112). All notices could have provided links to earlier related notices.
- For further information about IA03E0974, IA03E1720 and IA04E0161, please see pages 41-42 of the Supplement to the ECO's 2003/2004 annual report.

Storage of Leaking Drums

EBR Registry #: IA04E1088

Description

- MOE posted this emergency exception notice in July 2004 to notify the public that the ministry had issued a Director's Order under s.18 of the *Environmental Protection Act* to address a situation involving approximately 400 rusting old drums stored at an industrial site in Sarnia. According to MOE, the drums were poorly contained and there was evidence that they were leaking. The Order required the proponent and three other parties to: prepare a schedule for the implementation of containment measures; sample the drums; prepare an inventory of all materials stored; prepare an environmental site assessment report to assess the extent of contamination of soil, surface water and groundwater; and submit a plan to dispose of any waste and other contaminated materials.
- The notice stated that prompt action was necessary to prevent off-site impacts from run-off and air emissions and that therefore consultation was not possible. Any delays could have resulted in health, safety, environmental and property risks of harm or damage.

- In a conversation with the ECO in March 2005, MOE explained that while the ministry had been aware that the drums were being stored on the property for over nine years, it was only during an MOE inspection in early May 2004 that the ministry became aware that the drums were deteriorating and that they may be leaking. One week later, the owner of the drums attempted to move some of the drums from the site. While transporting the drums, the owner had an accident a few hundred metres away from the storage site which caused the contents to be spilled and was charged by the Ontario Provincial Police. MOE subsequently revisited the site and issued a Provincial Officer's Order requiring site clean up in the third week of May. Then, after determining that the owner was not fully compliant with the Provincial Officer's Order and that the owner's attempts to move the drums had created additional spillage on the site, MOE determined that the situation constituted an emergency. On July 19th, MOE issued the Director's Order which is the subject of this notice. After determining non-compliance with the Director's Order, MOE removed the drums itself between February 17 and March 17, 2005.

ECO Comment

- Acceptable use of an emergency exception notice.
- MOE should have provided further information in the notice, as it did to the ECO in March 2005, to explain why the situation constituted an emergency and why consultation was not possible. The notice should have also stated when the Director's Order was issued.
- This notice included numerous typographical errors, including the name of one of the orderees. The ECO encourages MOE to ensure the quality and readability of all notices posted on the Registry, especially the accuracy of terms that may be used to search the Registry.

Use of a Diesel-powered Tire Shredder
EBR Registry #: IA04E1330

Description

- MOE posted this notice in September 2004 to inform the public that it had issued a certificate of approval (C of A) under s. 9 of the *Environmental Protection Act* to Unisphere Waste Conversion. The C of A permitted the company to use a mobile tire shredder to remove stockpiled tires at its Norwich site. The notice indicated that the diesel-powered tire shredder would create a significant amount of noise and would emit particulate and combustion products. However, the notice went on to say that the shredder would only be operated temporarily and that *EPA* air emissions requirements for permanent sources would apply.
- The notice explained that the ministry could not consult on this decision as a delay in the removal of the tires would increase the risk of fire which would result in potential for damage to property, human health and the environment.

ECO Comment

- In the absence of key background information it is difficult to evaluate whether this was an acceptable use of an emergency exception. notice.
- MOE should have provided key background information, such as how many tires are currently on the site, how long the tires have been stored on the site and whether MOE had any previous involvement in the case.
- Given that the shredder is expected to be a source of air and noise pollution, MOE should have informed the public of what the permitted hours of operation are and approximately how long the shredder is expected to be in operation. MOE should have also indicated when the C of A was issued and what its effective date was.

Short-term Approval for the Management of a Municipality's Waste
EBR Registry #: IA04E1381

Description

- MOE posted this notice in October 2004 to inform the public that it had granted emergency approval to Waste Management of Canada Corporation, under s. 27 of the *Environmental Protection Act*, to allow the company to accept waste from the Regional Municipality of Peel between October 1st and 15th. The municipality sought the services of the waste disposal company after learning that the company that normally managed its waste would be unable to provide services for one week and that a City of Toronto waste transfer station would only be able to accept a portion of Peel's waste during that time. The notice stated that the municipality and Waste Management of Canada Corporation would work to minimize any resulting impacts of the emergency approval on the local community, such as the impact of increased truck traffic.
- The notice indicated that if the municipality did not find a legal alternative for waste disposal, there could have been a risk of illegal dumping, increase in vermin, disease and destruction of property.

ECO Comment

- Acceptable use of an emergency exception notice.

Fire at a Waste Site
EBR Registry #s: IA04E1527 and IA05E0108

Description

- In October 2004, MOE posted an emergency exception notice (IA04E1527) to inform the public that it had issued an *Environmental Protection Act* Director's Order (under sections 17, 18, 27 and 44) to Rail Cycle Inc. on October 25, 2004 to address a fire that had started at the company's waste site in the City of Vaughan, Ontario on October 13, 2004. The order suspended the current certificate of approval (C of A) for the site, thereby prohibiting the facility from accepting any additional waste. The order also required the owners and operators of the site to remove and dispose of excess waste at the site by December 13, 2004; prepare a detailed clean up plan; provide evidence of financial capability to carry out the plan; and report on clean up efforts.
- The notice indicated that a delay in issuing the orders would result in harm or serious risk of harm to the environment or injury or damage or serious risk of injury or damage to property.
- After a second fire broke out at a different location on the site in late November 2004, MOE determined that the company was not in compliance with the October 2004 Director's Order. On the same day, MOE issued a second Director's Order requiring the company to remove the excess waste and giving notice under s.147 of the *EPA* of the Director's intentions to cause things required by the original order to be done. MOE posted an emergency exception notice about the second fire and the ministry's actions to address it in early February 2005 (IA05E0108).

ECO Comment

- Acceptable use of emergency exception notices. However, transparency could have been improved if the two-month delay in posting the February 2005 notice had been shorter.
- MOE provided useful links to relevant documents, including a link to the notice sent to the company regarding the ministry's decision to suspend the C of A for the site. The ECO encourages MOE to do so in future cases.
- For further information on how the situation at the Rail Cycle Inc. site was handled by the ministry please refer to XA05E0003, below (pages 37-38 of this Supplement).

Equivalent Public Participation Exception under Section 30(1) of the *EBR*

Ministry of the Environment (MOE) – Regulation

Amendments to the Taking and Use of Water Regulation (O. Reg. 434/03) under the *Ontario Water Resources Act*

EBR Registry #: RA04E0010

Description

- MOE posted this notice in June 2004 to inform the public of its decision to exempt portable ready-mix concrete manufacturing plants from the moratorium imposed on new and expanding permits to take water (PTTWs). The decision was promulgated by issuing Ontario Regulation 166/04, a regulation to amend O. Reg. 434/03 under the *Ontario Water Resources Act (OWRA).* Under O. Reg. 434/03, a one-year moratorium on new or expanding PTTWs was applied to certain industries, including ready-mix concrete manufacturing and beverage manufacturing, throughout southern Ontario and in areas where conservation authorities exist in northern Ontario. The moratorium was to be in effect until December 31, 2004 and was put in place while the ministry undertook a review of the rules and processes governing water takings in the province.
- MOE explained that a s. 30 *EBR* exception notice was warranted because the ministry had consulted on the environmentally significant aspects of the decision as part of its consultation on the "White Paper on Watershed-based Source Protection Planning" (PA04E0003).

ECO Comment

- Unacceptable use of an exception notice. MOE did not outline any proposal to exempt the portable ready-mix concrete manufacturing sector in its White Paper or in its Registry notice about the White Paper. Nor is there any evidence that MOE solicited or received input on whether any industries should be exempt from the PTTW moratorium in its consultation sessions on the White Paper. The ministry's "Summary report: Consultation Sessions on the White Paper on Watershed-based Source Protection Planning" documents the questions posed by MOE and the input provided by those consulted. None of the questions or comments contained in that document pertain to the exemption of industries from the moratorium.
- For further information on O. Reg. 434/03 please refer to page 39 of the Supplement to the ECO's 2003/2004 annual report.
- In December 2004, MOE amended its Water Taking and Transfer Regulation and repealed O. Reg. 434/04. For further information on the amended regulation please refer to pages 116-120 of this year's annual report.

Ministry of Natural Resources (MNR) – Regulation

Establishing/Modifying Parks, Conservation Reserves, Nature Reserves under Ontario's Living Legacy Land Use Strategy

EBR #/Description

RB00E1001	Establishing 26 Conservation Reserves and an addition to an existing conservation reserve
RB00E2001	Establishing 76 Conservation Reserves

RB00E2002	Establishing 16 Provincial Parks, 13 existing Provincial Parks and the Re-classification and re-configuration of an existing Provincial Park
RB01E1002	Establishing 28 Conservation Reserves
RB01E2002	Establishing 20 new Conservation Reserves
RB02E1004	Establishing 4 new Provincial Parks
RB02E1005	Establishing 6 new Conservation Reserves
RB04E2002	Establishing a new Provincial Park

ECO Comment

- The regulations establish or modify parks and conservation reserves set out in Ontario's Living Legacy (OLL). Some of the notices are updates. In some cases, the notices' text provide information regarding permitted and prohibited land uses (such as hunting). Each of the notices set out specific reasons for using the section 30 *EBR* exception. Readers should refer to the notices themselves should they wish further detail. For more information on the nature of these notices, see pages 41-42 of the ECO's 2000/2001 annual report.
- In November 2004, the ECO urged MOE to begin posting park boundaries in areas with unresolved pre-existing mining claims proposed to be regulated as provincial parks and conservation reserves as a result of OLL (e.g., RB04E2002) as regular regulation proposals on the Registry. The regulation of these remaining protected areas would benefit from public scrutiny and input as site-specific boundaries may be substantially different than what was originally proposed in 1999. For more information please refer to page 168 of this year's annual report. See also page 8 of this annual report Supplement.

SECTION 4

ECO REVIEWS OF SELECT DECISIONS ON POLICIES, ACTS, REGULATIONS AND INSTRUMENTS

SECTION 4:
ECO REVIEWS OF SELECT DECISIONS ON POLICIES, ACTS, REGULATIONS AND INSTRUMENTS

MINISTRY OF ENERGY

Review of Posted Decision:
Bill 100 (*Electricity Restructuring Act, 2004*)

Decision Information:

Registry Number: AO04E0001	Comment Period: 45 days
Proposal Posted: June 22, 2004	Number of Comments: 3
Decision Posted: March 15, 2005	Came into Force: Dec. 9, 2004 (by Royal Assent)

Description

The Ministry of Energy (ENG) described Bill 100, the *Electricity Restructuring Act (ERA)*, as an initiative to promote the expansion of the electricity supply and capacity in Ontario, including supply from alternative and renewable energy sources and furthering the objectives of conservation, energy efficiency and load management. The new law's title, the *Electricity Restructuring Act*, is perhaps more revealing as, in addition to the above, the *ERA* introduced approaches, new to Ontario, for the management of electricity supply and demand and substantially restructured the electricity marketplace and system governance (see also chart ahead). Some of the key elements of the *ERA*, as described by ENG, included:

The creation of an agency called the "Ontario Power Authority" (OPA)

The OPA will be responsible for ensuring the adequacy of Ontario's electricity supply over the long term. The agency will assess Ontario's electricity needs and resources and enter into contracts to purchase electricity and manage electricity demand. Though an independent agency, the OPA will be subject to directives from the Minister of Energy and will need to seek approval for many of its operations from the Ontario Energy Board. The Ontario Power Authority will assume responsibility for electricity supply and demand management contracts awarded through requests for proposals issued by the Government of Ontario in 2004.

Creation of a Conservation Bureau within the Ontario Power Authority

The *Electricity Restructuring Act* creates a Conservation Bureau within the OPA, which will be headed by a Chief Energy Conservation Officer. The Bureau will provide leadership in the planning and coordination of electricity conservation and demand management measures. The Bureau will also monitor and report on Ontario's progress in achieving conservation targets and reducing overall electricity demand.

New Price-Setting Mechanism and New Rate Plan

The *ERA* will change the way electricity prices are set in Ontario. Electricity prices will be set in two ways. Part of Ontario's electricity supply will be price-regulated by the Ontario Energy Board, and part will be paid contract or competitive market prices. Bill 100 will also establish a new annual rate plan for small volume and other consumers. Homeowners and small businesses will pay a blended price based on regulated contract and forecasted market prices. This blended price will be regularly adjusted by the Ontario Energy Board.

Detailed Review of Bill 100 Amendments

The *Electricity Restructuring Act* made amendments principally to two Acts, the *Electricity Act, 1998* and the *Ontario Energy Board Act, 1998* (Schedules A and B of the *ERA*, respectively) and minor amendments to other Acts (Schedule C). The following is a summary of some of the amendments in the *ERA* based on the ECO's review.

Structural Evolution of Ontario's Electricity System

Before 1998	1998 to 2004	2005
Ontario Hydro	• Ontario Power Generation • Hydro One • Independent Electricity Market Operator • Electricity Safety Authority • Ontario Electricity Finance Corporation • Ontario Energy Board (role expanded)	• Ontario Power Generation • Hydro One • Independent Electricity System Operator • Electricity Safety Authority • Ontario Electricity Finance Corporation • Ontario Power Authority • Ontario Energy Board (role expanded)
The *Power Commission Act* of 1906 creates the Hydro-Electric Power Commission which would go on to become formally known as Ontario Hydro in 1974	Legislation in 1998 splits the former Ontario Hydro into 5 successor companies and expands the role of the OEB	The *Electricity Restructuring Act* changes the IEMO to the IESO creates the OPA, and expands the role of the OEB

Roles of the Major Provincial Players as of 2005:

Ontario Power Authority

Buys new sources of power or conservation from industry

Ontario Power Generation

Ontario's major power generator

Hydro One

Ontario's major power transmitter

Independent Electrical System Operator

Forecasts short term power needs / watches over whole system

Ontario Electricity Finance Corporation

Manages debt left by Ontario Hydro

Electricity Safety Authority

Oversees safety issues

Ontario Energy Board

Sets power rates

Schedule A: Amendments to the Electricity Act, 1998

Part I (general provisions) of the *Electricity Act* was amended in a number of areas. The *ERA* amended the purposes of the *Electricity Act*. For example, the first two purposes were formerly (a) to facilitate competition in the generation and sale of electricity and to facilitate a smooth transition to competition; and (b) to provide generators, retailers and consumers with non-discriminatory access to transmission and distribution systems in Ontario. Because of the *ERA*, the first two purposes now read (a) to ensure the adequacy, safety, sustainability and reliability of electricity supply in Ontario through responsible planning and management of electricity resources, supply and demand; (b) to encourage electricity conservation and the efficient use of electricity in a manner consistent with the policies of the Government of Ontario. In short, where the *Electricity Act* provisions enacted in 1998 as part of the *Energy Competition Act (ECA)* emphasized competition and the development of a marketplace for electricity in Ontario, the amended Act instead emphasizes consumer interest, electricity service reliability and a financially viable electricity industry.

The *ERA* also amended Part I of the *Electricity Act* to require the Minister of Energy to establish a committee to provide advice on electricity-related matters, however the Bill provides no further detail about the committee's work or composition. Also, definitions such as "renewable energy source" were added to this part of the *Electricity Act*.

Changes to the IMO

Part II of the *Electricity Act* as enacted in 1998 created an agency called the Independent Electricity Market Operator (IMO). The IMO was launched in 1999 to play a central role in fostering Ontario's electricity market and system reliability by entering into agreements with market participants, forecasting need, and enforcing electricity market rules. Part II of the *Electricity Act* was amended by the *ERA* to reconstitute the IMO. It will now be known as the Independent Electricity System Operator (IESO) and its mandate of forecasting electricity demand and resources will now be limited to short-term forecasting. The IMO-grid and IMO-administered markets were renamed the IESO-grid and the IESO-administered markets. The *ERA* goes on to spell out the objects of the IESO, the composition of its board of directors, need for director independence and other matters. The *ERA* also includes a provision that the IESO undertake stakeholder consultation. For accountability, the IESO will need to prepare and submit for approval to the Minister a business plan each year. Furthermore, the Auditor General for Ontario will be able to audit the accounts and transactions of the IESO.

Creation of the OPA

A new part (Part II.1) was added to the *Electricity Act* which established a wholly new organization called the Ontario Power Authority ("OPA"), an independent non-profit corporation that will conduct assessments of Ontario's electricity resources to ensure its adequacy, safety and reliability. A key function of the OPA, in plain language, will be to make sure there is either enough electricity being generated or conservation undertaken so that Ontario's electricity demand does not exceed the available supply over the long term. The OPA will do this through integrated power system plans and procurement processes which must be approved by the Ontario Energy Board, and through management of Ontario's electricity supply, transmission, capacity and demand according to the new powers under Part II.2 of the *Electricity Act*. The OPA may enter into contracts to procure electricity supply or demand management services. (The OPA will assume responsibility for the request for proposal process initiated by the Ministry of Energy in 2004 to procure electricity supply and/or demand management projects.)

Other functions of the OPA include: to diversify the sources of electricity supply by promoting the use of cleaner energy sources and technologies; to establish system-wide goals for the amount of electricity to be produced from alternative energy sources and renewable energy sources; to engage in activities that facilitate load management; to engage in activities that promote electricity conservation; and to assist the Ontario Energy Board by facilitating stability in rates for certain types of consumers. The OPA will report annually to the Legislature and its directors will be appointed by the Minister. The Authority will recover its costs through fees approved by the Ontario Energy Board and through charges. The OPA is not a Crown agent.

Accordingly, the *ERA* set rules for OPA directors, their terms of office "initially not exceeding two years, with the possibility of reappointment for five years" and their duties to "act honestly and in good faith in the best interests of the OPA". The *ERA* also added to the *Electricity Act*, a Conflict of Interest provision that applies to the directors and officers of the OPA and another provision that permits the OPA board to establish a Code of Conduct. Like the IESO, the OPA will be required to set up stakeholder consultation processes. And, like IESO, the OPA will need to produce yearly business plans. The OPA however will be subject to a yearly financial audit by a licenced accountant, in addition to being subject to audits by the Auditor General of Ontario. The Minister of Energy will be required to table, in the Legislative Assembly of Ontario, the annual report which the OPA produces.

Conservation Bureau

The OPA is required to establish a Conservation Bureau, headed by a Chief Energy Conservation Officer (CECO) because of *ERA* amendments to Part II.1 of the *Electricity Act*. The Bureau and CECO will provide leadership in the planning and co-ordination of electricity conservation measures. The CECO is required to produce a detailed report of conservation efforts each year and make the report public within seven days of submitting it to the OPA directors and the Minister of Energy.

The enactment of Section 25.33 of the *Electricity Act* was intended to ensure that market participants will, in time, pay the true cost of electricity. This provision authorizes the IESO to do this through its billing and settlement systems. Temporary differences between amounts paid to generators and amounts paid by consumers will be recorded and cleared through variance accounts established by the OPA.

Amendments to Part III of the *Electricity Act* give the Ontario Energy Board the authority to review and approve amendments to market rules for the IESO-administered markets. New Part XI.1 of the *Electricity Act* provides rules for the transfer of the Market Surveillance Panel of the IESO to the Ontario Energy Board and the transfer of medium and long-term electricity planning functions to the OPA from the IESO. Freedom of information and protection of privacy provisions are spelled out for the various organizations. For example, although generally, records obtained by the Market Surveillance Panel are to be made available to the public, information concerning trade secrets or law enforcement matters may not be subject to disclosure under the *Freedom of Information and Protection of Privacy Act (FIPPA)*. Previously, there was uncertainty about the scope of *FIPPA*'s application to agencies and corporations like OPG, created under the *Energy Competition Act*.

Because of the *ERA* addition of a new section under Part IV.1 of the *Electricity Act*, Ontario's major electricity generator, OPG, was granted unfettered authority to develop a project associated with its hydro-electric generating complex at Niagara Falls, that is "Ontario Power Generation Inc. may, without any further approval and without consent of the owner….take possession of, expropriate and use such land…for the purpose of the expeditious development and construction of works…from the Niagara River to any existing or future power generation facilities." Further, anyone's right to challenge any aspect of this project through the courts was effectively quashed by the *ERA*: "No action or exercise of a power by Ontario Power Generation Inc. under this section shall be restrained by injunction or other process or proceeding in any court."

Finally, Schedule A closes with the identification of 54 specific areas in which Cabinet may make regulations.

Parallel Amendments
The ERA also contains parallel amendments to both the *Electricity Act* and the *Ontario Energy Board Act* that are essential to the new government's initiatives.

The enactment of section 29.1 of the *Electricity Act* and parallel amendments to section 71 of the *Ontario Energy Board Act, 1998* permits the OPA, transmitters and distributors to promote energy conservation, energy efficiency, load management and alternative and renewable energy. The two Acts were amended by the *ERA* to allow, but not require, that these agents offer the services listed above.

Schedule B: Amendments to the Ontario Energy Board Act, 1998
The *ERA* significantly altered the OEB's objectives related to electricity. Prior to the *ERA*, the OEB's objectives for electricity had been: to facilitate competition in the generation and sale of electricity and to facilitate a smooth transition to competition; to provide generators, retailers and consumers with non-discriminatory access to transmission and distribution systems in Ontario; to protect the interests of consumers with respect to prices and the reliability and quality of electricity service; to promote economic efficiency in the generation, transmission and distribution of electricity; to facilitate the maintenance of a financially viable electricity industry; to promote energy conservation, energy efficiency, load management and the use of cleaner energy sources, including alternative and renewable energy sources, in a manner consistent with the policies of the Government of Ontario; and to promote communication within the electricity industry and the education of consumers.

The *ERA* creates the following new objectives for the OEB: to protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service; and to promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry. As with the object amendments to the *Electricity Act*, the *OEBA* objectives have been amended by the *ERA* to emphasize consumer interest, electricity service reliability and a financially viable electricity industry where they formerly prioritized competition and the development of a marketplace for electricity in Ontario.

As noted under the *Electricity Act* amendments, the *ERA* transferred the Market Surveillance Panel (MSP) from the IMO (now effectively the IESO) to the Ontario Energy Board. The MSP will continue to carry out surveillance of IESO-administered markets as per the *Electricity Act*. Surveillance helps prevent abuse of market rules that could, for example, work against consumers.

Under amendments to section 57 of the *OEBA*, the OPA is required to be licensed by the Ontario Energy Board.

An *ERA* amendment removed a provision that established an advisory committee for the OEB and replaced it with a requirement that the OEB carry out consultations with consumers, generators and others with an interest in electricity so they may provide advice to the Board.

A number of *OEBA* amendments were undertaken to change the 'mechanics' of the electricity market. Previous to the *ERA*, the direction had been to use the open market and competition as much as possible to establish price, inform participants in the market with the intent of having market participants make more decisions about their own electricity consumption.

OEBA Section 78 was amended to permit the Ontario Energy Board to approve or fix different electricity rates for different classes of consumers and different situations. Before the *ERA*, amounts payable to generators were determined through the operation of the IMO-administered markets. Certain generators will continue to be paid on this basis.

A section added to the *Ontario Energy Board Act* (s. 78.1) enables the amounts payable to electricity generators to be prescribed by regulations. Initially, the amounts payable will be determined under the regulations and later by the Ontario Energy Board. New section 78.2 of the *Ontario Energy Board Act* provides the mechanism for regulated payments to be made to the Electricity Finance Corporation of Ontario (EFCO) by generation facilities. (The EFCO was set up to manage the outstanding debt, financial risks and other liabilities of the former Ontario Hydro.)

New sections 78.3 and 78.4 of the *OEBA* allow the Ontario Power Authority to receive amounts payable for electricity supply and capacity availability, respectively, as determined under procurement contracts entered into under Part II.2 of the *Electricity Act, 1998*.

Subsection 79.4 (1) of the *Ontario Energy Board Act* currently provides that low-volume and designated consumers pay prices set by the regulations from April 1, 2004 until April 30, 2005 or any earlier day that is prescribed by the regulations. After that day, prices will be determined by the Ontario Energy Board. The re-enactment of clauses 79.4 (1) (a) and (b) of the *Ontario Energy Board Act* provides that prices will continue to be determined under the regulations until the day prescribed by the regulations. After the repeal of section 79.4, new section 79.16 will permit consumers prescribed by the regulations to pay a price for electricity that is initially set by regulation and later will be fixed or approved by the Ontario Energy Board.

Schedule B closes with provisions for making regulations in approximately 51 areas.

Schedule C: Amendments To Other Acts
Schedule C contained administrative changes, such as references to the "IMO-controlled grid" being changed to the "IESO-controlled grid" in the *Assessment Act* and the *Corporations Tax Act*.

Implications of the Decision
The *ERA* will have a variety of social, economic and environmental implications.

Social
The *ERA*, along with other initiatives of the government such as the *Ontario Energy Board Amendment Act (Electricity Pricing), 2003*, will lead to, or already has led to higher prices for electricity in Ontario. While Ontarians are likely to pay more for electricity in the future, the increases applied or foreseen up to mid-2005 were not of a magnitude to cause social distress. Individuals and organizations have called for various means to alleviate future price increases for low income Ontarians, e.g., a public benefits charge of 0.3 cents per kWh applied to all electricity sales to help finance energy efficiency and low-income assistance programs. A joint ministry effort has created a program of retrofitting social housing units across the province. It should be noted though that many of these units are owned or operated by the Province or a municipality with the electricity bills being paid by the public, not the tenants. More attention may need to be paid to mitigating the effect (through conservation programs) of higher electricity bills on lower income Ontarians in privately-owned rental accommodation. Provisions contained in the *ERA,* along with other measures may encourage residents to focus more on conservation, though not likely to the degree that occurred in California in the early 2000s, or in North America with the oil price spikes of the 1970s.

Economic
The economic implications of the *ERA* are quite substantial for those industries involved in electricity generation or conservation. The *ERA* furthers the move away from a single state-owned electricity monopoly (with the former Ontario Hydro at its heart) to a part-public/part-private model, one in which there should be more generators and more flexibility in how demand for electricity is met (i.e. through

new supply or conservation). This should lead to a more diverse, multi-player environment in the electricity-generating sector. However, the marketplace, its rules and dynamics are quite complex – entry into the market will not be simple or straightforward. Much of the electricity market will remain a command and control economy with the OPA, ENG and the OEB making many key decisions.

The new pricing scheme will eventually have an impact on the cost of doing business in Ontario. Those businesses which are highly sensitive to changes in electricity price may find adjustment difficult in years ahead, unless they focus more on energy use and conservation. However, as of mid-2005, it is too early to identify any specific economic consequences of the *ERA* such as changes in electricity consumption because of higher electricity prices.

Environmental

The environmental impacts of the *ERA* are not likely to manifest quickly, but should appear in time, as reinforced by other initiatives. For example, if the OPA were to emphasize conservation over new supply then the environment would most likely benefit. Also, the *ERA*'s provisions for new rate plans, along with the promotion of renewable energy, conservation initiatives, net metering (see Registry proposal RO04E0001) or the province's plan to install interval meters which tell consumers the price of electricity at specific times, could lead to a shift in demand and lower average consumption in households across Ontario in the future. If demand can be reduced or shifted, then emissions may be reduced or new generating infrastructure avoided. In early 2005, the minister announced the appointment of the first Chief Energy Conservation Officer to facilitate such efforts.

Public Participation & *EBR* Process

The *ERA* was the subject of considerable discussion and consultation since its introduction in the Ontario legislature in June 2004. In late June, the *ERA* was posted as a proposal on the Environmental Registry for a 45-day comment period. In August 2004, the Ontario Legislature's Standing Committee on Social Policy held hearings on the proposed legislation. On December 9th 2004, the *Electricity Restructuring Act* received Royal Assent.

During the comment period, three comments were submitted to ENG in response to the Registry proposal notice. ENG's assessment of the effect of comments on the decision was that:

> Comments received were generally positive and supported the government's goal of updating and improving the Electricity Act, 1998. Although stakeholders view the *Electricity Restructuring Act* as a generally positive piece of legislation, there have been many comments made relating to the role of renewable energy sources in the province's overall supply mix. The government is committed to a target of 5 per cent (1,350 megawatts) of all generating capacity to come from renewable sources by 2007, and 10 per cent (2,700 megawatts) by 2010. As a common theme, many stakeholders advocated that renewable energy sources should be mandated in legislation and that a progressively increasing percentage of Ontario's supply mix should come from sources of renewable energy. The *Electricity Restructuring Act* does however contain a provision which provides that the Minister may issue, and that the Ontario Power Authority (OPA) shall follow in preparing its integrated power system plans, directives that set out the "production of electricity from particular combinations of energy sources and generation technologies.

ENG's statement is accurate in that commenters generally offered some praise for the proposed direction set out in the new law, however, the commenters also added specific concerns and recommendations. ENG did not explain clearly the effect of these comments on the decision. Some of the commenters' remarks and recommendations are described below in greater detail.

One commenter made suggestions based on the observations that worldwide petroleum and natural gas reserves are reaching the half-way point in terms of their depletion; that with rising energy cost worldwide, Ontario's economic success in future will depend on improvements in conservation and efficiency; and that the price of electricity should reflect its cost, and that the cost of all phases of projects be incorporated into the price, i.e., including decommissioning and waste disposal costs). Based on these and other points the commenter recommended enshrining in the *ERA* a strong target – that by the year 2020, 25 per cent of the total electricity generated in Ontario be from renewable energy sources. To ensure the target can be met, the commenter suggested the adoption of fiscal measures (e.g. incentives) for the renewable energy industry. To protect low income consumers from price increases the commenter recommended a system of graduated refunds, and that the federal Goods and Service Tax refund program would make a good model for an Ontario-based program. Finally, the commenter recommended an amendment incorporating the decommissioning and waste disposal costs into the price of electricity so that the nuclear industry is required to include these costs in their pricing estimates.

Another commenter whose organization promotes community-based and cooperative electricity generating projects made five recommendations mostly aimed at advancing community-based and co-operative electricity generating schemes. ENG should tighten the definition for alternative and renewable energy by restricting it to those cleaner energy sources that have a minimal environmental impact and are renewable, as defined by Environment Canada's Environmental Choice Program (the commenter felt this was needed to prevent "clean coal" technology or nuclear power from being included under ENG's definition). Secondly, ENG should establish a Renewable Portfolio Standard (RPS) which would establish a minimum amount of electricity to be produced by renewable energy sources (the ECO notes that in 2002/2003, under the previous government, ENG reported that it was planning a "Green Power Standard"; ENG could have updated the status of this initiative in its decision notice to inform the commenter. ENG's targets e.g., 10 per cent electricity from renewable sources (2,700 megawatts) by 2010, may approximate the effect of an RPS if and when these commitments are achieved, however the commitments are not enshrined in legislation). ENG responded to this comment by noting that the *Electricity Restructuring Act* permits the minister to issue directives to the OPA about the "production of electricity from particular combinations of energy sources and generation technologies" which the OPA shall follow in preparing its integrated power system plans. Thirdly, the *ERA* should more explicitly define differing situations (the *ERA* added to the *OEBA* provisions for annual rate plans and separate rates for different situations prescribed by regulation, but no further detail); a different situation according to this commenter could include more favourable payment schedules for renewable energy generators which avoid the additional societal costs associated with coal fired and nuclear generation. The commenter also recommended that ENG create alternatives to the Request for Proposal process that ENG has been using to procure new sources of generation, so that small generators can get involved in Ontario's electricity procurement process. Finally, it was suggested that ENG streamline the procurement, approvals and grid interconnection processes for smaller scale, community-based projects.

Another commenter represented an organization that promotes environmentally sustainable forms of electricity generation. This organization felt that the *ERA* was too broad and vague and that as drafted left too many details to be worked out in regulations. Further, the organization felt that the bill did not recognize the value of local generation (i.e., electricity generated close to the point of demand, as opposed to generated at large facilities and distributed great distances). To improve or expand local ownership of renewable generation two key ingredients were required in the bill: the right of access to electricity grid, and a set rate paid for electricity per kilowatt-hour generated to justify renewable energy investments. The commenter felt that a mechanism, used extensively in Europe and known as a Renewable Energy Tariff (RET) would be an effective means to accomplish both, as European RET programs permit the interconnection of renewable sources of electricity with the electricity grid, and as well, specify how much the renewable generator is paid for their electricity. The commenter suggested that Section 25.9 (2) of the *Electricity Act, 1998* which is a section of a new part (Part II.2 Management Of Electricity Supply, Capacity And Demand) of the Act could be the location where the RET-enabling powers could be enshrined.

The commenter noted that the *ERA* enshrined as a duty of the directors of the OPA to "act honestly and in good faith in the best interests of the OPA" and suggested that this clause should be reworded to read that the duty of the directors of the OPA are to "act in best interests and the sustainable health and welfare of the people of Ontario." This commenter also suggested that in addition to the creation of a Conservation Bureau, ENG should consider creating a bureau for renewable and sustainable energy.

Finally, the commenter worked through the bill itself, and inserted suggested amendments where it was felt they appropriately belonged. The suggested amendments, if incorporated into the bill, would have put into effect the comments, such as those above, made by the organization.

How ENG considered most of these comments is not easily apparent from ENG's decision notice.

SEV

ENG completed a brief statement of consideration of its Statement of Environmental Values and filed it with the Environmental Commissioner in April 2005. In its SEV statement, ENG highlighted a few aspects of the *ERA* decision that fit under its SEV themes "Resource Conservation", "Environmental Protection" and "Ecosystem Protection". Under Resource Conservation, ENG notes the establishment of the Conservation Bureau. Under Environmental Protection, ENG referred to the directive powers the Minister now has to set targets for renewable energy and conservation. Under Ecosystem Protection, the ministry noted that the bill will not result in any negative ecosystem impacts.

Other Information

Ontario's electricity system has been undergoing adjustment almost continuously since the enactment of the *Energy Competition Act* in 1998. This legislation was intended to put in place a competitive marketplace for electricity which opened officially on May 1, 2002. The market remained open until November 2002, when the government introduced legislation freezing the price of electricity at 4.3 cents per kilowatt hour and effectively closing the market until 2006, or an earlier announced date. Then, after a change of government, the new administration made legislative changes in November 2003 which allowed it to set by regulation a new interim price for electricity (4.7 cents per kilowatt hour effective April 1, 2004) and a plan to have the OEB set prices as of May 2005. In June 2004, the government introduced the *ERA*, the subject of this review, which will continue the restructuring of Ontario's electricity sector in various ways.

The Ontario Sustainable Energy Association noted in a media release in late 2004 that Ontario's ruling party had adopted Renewable Energy Tariffs as part of the party's energy policy platform at its policy convention in November of that year.

ECO Comment

The *Electricity Restructuring Act, 2004* was the third piece of legislation in as many years that changed Ontario's electricity system and in many ways the most significant of the three (see "Other Information" above). The *ERA* continued the evolutionary process of Ontario's electricity system – a process begun by the previous government. That effort attempted to move it away from the longstanding model whereby a single state-owned monopoly, Ontario Hydro, controlled nearly all generation and most distribution activities. The new model created by the *ERA* will again try to establish a greater role for private and community-based generators and a more balanced public-private composition. The system under the *ERA* should result in more generators in the system and more flexibility in how demand for electricity is met (i.e. through new supply or conservation). However, the *ERA* does not place as much emphasis on marketplace competition to control prices, in the way that the structuring in the late 1990s intended to do.

Also, Ontario Power Generation and Hydro One will remain dominant players in Ontario's electricity sector in the years ahead. And many aspects of the new system continue along the lines of a 'command and control' model, with ENG, the OEB and the new OPA being principal decision-makers.

The ECO cautiously welcomes many of the directions brought about by the *ERA* although many details remain to be worked out – this legislation includes a large number of regulation-making provisions. Also unknown at this time is how successful the Conservation Bureau within the OPA will be at promoting electricity conservation. Large utilities such as Ontario Hydro and OPG have historically sought more generating capacity to meet a growth in demand, rather than implement conservation measures. If the province really wants conservation to predominate, some energy observers have opined that the institutional arrangement of the Ontario Power Authority be revamped, so that the OPA reports to the Chief Energy Conservation Officer, rather than vice versa. Nevertheless, the OPA should play a vital role in enhancing Ontario's electricity system reliability. Some energy analysts consider a major cause of the electricity shortage in the state of California in 2000-2001 to be the lack of an agency which would oversee electricity and/or conservation procurement. The OPA should be the type of agency which could prevent electricity shortages from occurring in Ontario, by analysing the system and recommending new generating capacity or conservation before critical shortages arise and brown-outs occur (the OPA will do this by creating integrated power system plans and procurement processes which must be approved by the OEB).

A provision in the *ERA* is intended to ensure that market participants will, in time, pay the true cost of electricity. This provision authorizes the IESO to do so through its billing and settlement systems and by taking into account the mix of regulated and market prices payable to generators and prices payable under amendments to the *Ontario Energy Board Act, 1998.* Time will tell whether the market place price of some forms of electricity will reflect its true cost. For many years, the cost of OPG's nuclear program, particularly reactor refurbishment, has been subsidized by the taxpayers of Ontario. This, in turn, meant that the price of nuclear generated electricity in Ontario did not reflect its full cost. Some analyses suggest that the real cost of OPG's nuclear-generated electricity in Ontario could be about double the rate of 4.7 cents per kilowatt-hour charged to low-volume consumers in Ontario at the start of 2005. Governments have been reluctant to charge the full cost because of consumer reaction. Nevertheless, any effort to bring the price closer to the cost could strengthen conservation efforts and create a more balanced, efficient, electricity marketplace.

The enactment of section 29.1 of the *Electricity Act* and parallel amendments to section 71 of the *Ontario Energy Board Act, 1998* permitted the OPA, transmitters and distributors to promote energy conservation, energy efficiency, load management and alternative and renewable energy. The two Acts were amended by the *ERA* to allow, but not require, that these agents offer the services listed above. Past experiences have shown that governments must establish strong financial incentives or legal obligations to ensure energy conservation is practiced; conservation programs are likely to fail if they rely primarily on voluntary participation and introduced into in a marketplace with relatively low energy prices. ENG should specify more clearly how ongoing conservation efforts by transmitters and distributors will come about in the years ahead. Also, ENG could do a better job of describing and accounting for the comments it receives on proposals – some of the comments brought forward, ENG may in fact be partially undertaking or achieving in some way – the commenters deserve to apprised of this; if comments can not by incorporated into the decision, then ENG should also explain this to the commenters.

Finally, the ECO believes that enshrining the renewable and conservation targets in law is sensible. Furthermore, one of the targets recommended, i.e., that by the year 2020, 25 per cent of the total electricity generated in Ontario be from renewable energy sources (not including the current installed hydroelectric generating capacity) is achievable – as it stands the province is already attempting to achieve a 10 per cent target by 2010. To further foster renewable energy in the province, ENG should examine the process by which generators gain access to the transmission grid, to ensure it is fair to, and reasonably affordable for smaller generators and renewable-based generators. The ECO will continue to monitor future electricity system developments in Ontario.

MINISTRY OF THE ENVIRONMENT

Review of Posted Decision:
Bill 49 - *Adams Mine Lake Act*

Decision Information:

Registry Number: AA04E0001	Comment Period: 30 days
Proposal Posted: May 6, 2004	Number of Comments: 3
Decision Posted: July 22, 2004	Came into Force: June 17, 2004

Description

On June 17, 2004, Bill 49, the *Adams Mine Lake Act* (*AMLA*), received Royal Assent, closing the door, unless further legislative changes are made, on one of the most controversial proposals for the disposal of the City of Toronto's waste – the dumping of solid, non-hazardous waste into the Adams Mine pit. With the enactment of the *AMLA*, disposal of waste in the abandoned iron ore pits at the Adams Mine site near Kirkland Lake was prohibited; the approvals and agreements that had been granted in the late 1990s by the government for the use of this waste disposal site were revoked; and the compensation for expenses incurred by the previous and current owners of the site, Notre Development Corporation and 1532382 Ontario Inc. respectively, was defined. *AMLA* also revoked any agreement of purchase and sale of Crown land that may have been entered into between the Ministry of Natural Resources and the current and previous owners of the Adams Mine.

Under the *AMLA*, the province has agreed to pay the previous and current owners of the Adams Mine site for out-of-pocket expenses related to the development of the landfill site. Expenses can be claimed for the acquisition of the Adams Mine site; surveys, studies and testing; engineering and design services; legal services; marketing and promotion; property taxes; seeking government approvals and acquisition of Crown Land. However, the fair market value of the site will be deducted from claims filed by 1532382 Ontario Inc. *AMLA* also prevents legal action being taken against the Crown as a result of this legislation.

Bill 49 also amended s. 27 of the *Environmental Protection Act* (*EPA*) to prohibit anyone from using, operating, establishing, altering, enlarging or extending a waste disposal site where waste is deposited into a lake that is at least one hectare in area, including a lake that results from human activities and that is directly influenced by or influences ground water.

When the Ministry of the Environment (MOE) first tabled Bill 49 in the Ontario Legislature, it also announced that a discussion paper was going to be released outlining options for achieving Ontario's 60 per cent waste diversion target by 2008 and that a panel was going to be created to make recommendations on how to improve the environmental assessment process. As of March 2005, both of these initiatives are in progress.

Implications of the Decision

Although the primary objectives of *AMLA* were to end any further consideration of the Adams Mine as a waste disposal site and to provide the site owners with compensation for expenses, it also made clear that any lakes over one hectare in area, including lakes created as the result of human activity, are not appropriate locations for the disposal of wastes. For many opponents of the Adams Mine disposal site, the enactment of Bill 49 has provided closure to a fight that began over 15 years ago. However, it is unclear how this decision will affect projects such as the proposed confined disposal facility in Hamilton which involves disposal of contaminated sediment within a structure in the waters of the harbour.

This decision has also eliminated the possibility that the City of Toronto can reconsider the Adams Mine as a potential landfill site unless legislative changes are made. Although the city has been implementing various waste diversion programs (such as the green bin program and fees to encourage recycling by apartment owners) to reduce the amount of waste going to landfill, the city will still require landfill space and continues to look for disposal options.

This is only the second time that the government has amended the *Environmental Protection Act* for the purpose of prohibiting new or expanded landfill sites in certain locations. The first time was in 1994 and the location was the Niagara Escarpment Plan Area. This, however, is the first time that a type of location, i.e., lake, has been specified in addition to a specific geographic area.

Public Participation & *EBR* Process

Bill 49 was posted on the Environmental Registry for the minimum notice period of 30 days during which time MOE received only three submissions. However, 18 submissions on Bill 49 were made to the Standing Committee of the Legislative Assembly which conducted two days of public hearings on the bill.

All three *EBR* commenters were concerned that the definition of "lake" included storm water ponds, mine tailings facilities, leachate management facilities and other "lakes" that have been created by human activities. They note that these types of "lakes" are common in Ontario and are operating with the approval of the government, but that with the enactment of this legislation, operators would either have to cease operations immediately or build new facilities. The Ontario Mining Association noted that the definition of the lake did not include consideration of whether or not the lake supported a naturally occurring ecosystem or fish habitat. One commenter suggested that MOE had undermined its "mandate and competence" since the Adams Mine had undergone an extensive environmental review and had received approvals from the MOE. The commenter concluded that the reason for Bill 49 was political, not environmental.

Prior to final passage of Bill 49, the Ontario government made two key amendments to the bill. The purpose of the first amendment was to allow the prior owner, Notre Development Corporation, to obtain compensation for its expenses. Another amendment clarified that the definition of a lake did not include large ponds for the management of storm water or a waste disposal site on which there was a lake that was in no way related to waste management operations.

Although the ECO would normally prefer a longer comment period for a proposal related to such a controversial project, the ECO does agree that 30 days was adequate in this case. The environmental issues of using Adams Mine as a landfill site had already been discussed during the environmental assessment process and more recently at the hearings of the Standing Committee. The ECO notes that the *AMLA* is the fulfillment of an election promise made by the Ontario Liberal Party and that MOE did make changes to Bill 49 in response to comments.

SEV

In a note to the ECO, MOE stated that the *AMLA* supported the following SEV considerations: environmental protection, ecosystem approach and resource conservation. In particular, MOE noted that use of the Adams Mine as a landfill site had the "potential to create significant impacts on both the natural environment, as well as on the people who live in North-Eastern Ontario" and that "local and regional ground and surface water will be protected from potential contamination from the proposed landfill." MOE also noted the *AMLA* will end the uncertainty over Adams Mine which "has for too long drained the energy and resources of local communities."

ECO Comment

The proposal to use the abandoned pits at the Adams Mine as a landfill site for the City of Toronto's solid waste has been a controversial issue in Ontario since 1989. Several local town councils supported the proposal even though the site was outside of their jurisdiction, but the Beaverhouse First Nation, many of the local residents and the local farm association were opposed to the idea. Environmental groups and many Torontonians were also opposed to the idea of shipping garbage such a long distance and believed that the proposal would shift attention away from efforts to improve diversion rates. Despite the outcry in 1998, MOE used its new powers under the revised *EAA*, to limit discussion of the proposal by scoping the environmental assessment to the leachate management system and requiring that the assessment be done within six months. As a result, the EAB had no authority to review alternatives to the proposal. Since this project was approved under the *EAA*, the ECO has limited authority to comment because most government decisions made under this Act are exempted from the *EBR*. However the ECO has reviewed the relationship between the *EAA* and the *EBR* and identified a number of gaps related to public participation rights. (For additional information, refer to the 2003/2004 ECO annual report, pages 52-59.)

The *AMLA* fulfils a Liberal election campaign commitment and does have the benefit of providing certainty to those that opposed the proposal that the Adams Mine won't become a landfill site unless the current legislation is changed. However, the *AMLA* continues the piecemeal approach to waste management issues in Ontario that the ECO wrote about last year. (For additional information, refer to the 2003/2004 annual report, pages 78-85.) The ECO continues to urge MOE to develop an overall waste management strategy that addresses not just diversion but also disposal. While the ECO agrees that diversion efforts should be given priority, there is a current and ongoing requirement for municipalities to dispose of waste in an environmentally-appropriate manner.

Review of Posted Decision:
Cedarwell Excavating Ltd.: Permit to Take Water

Decision Information:

Registry Number: IA04E0216	Comment Period: 30 days
Proposal Posted: February 12, 2004	Number of Comments: 106
Decision Posted: May 4, 2004	Decision Implemented: April 29, 2004

Description

Cedarwell Excavating Ltd ("Cedarwell") is located in Hanover, Ontario in the County of Grey. At the beginning of 2004, Cedarwell applied to the Ministry of the Environment (MOE) for a permit to take water (PTTW) under section 34 of the *Ontario Water Resources Act (OWRA)* for an aggregate washing operation. MOE approval was granted in April 2004 for Cedarwell to take water from a dugout pond to wash stone. Once the water has been used, it will drain into a settling pond through a closed loop system and filter through a clear stone berm back into the dugout pond; thus circulating the water for reuse. The PTTW allows a maximum of 239,760 litres of water to be used per day. While the Registry proposal notice stated that "the expected duration of this permit should be for 10 years from the date of issue," the final permit was issued for only two years.

As a condition of the PTTW, MOE has required Cedarwell to "install and operate an electronic metering device to continuously monitor the water level in the aquifer." MOE has also imposed a condition that if "the taking of water is observed to cause any negative impact to other water supplies obtained from any adequate resources that were in use prior to initial issuance of a Permit" then the permit holder will be required to "take such action necessary to make available to those affected, a supply of water equivalent in quantity and quality to their normal takings, or shall compensate such persons for their reasonable costs of so doing, or shall reduce the rate and amount of taking to prevent or alleviate the observed negative impact."

Implications of the Decision

Many local residents depend on the groundwater from this aquifer as their source of drinking water. According to MOE, the water taking authorized by the PTTW will not have any adverse effects on the quality or quantity of the local water supply because "the ministry is convinced that the risk for adverse effects to nearby ground and surface water resources resulting from the approved water taking is low." MOE imposed monitoring conditions in the PTTW, including a metering device, which should guard against unacceptable over-taking and noted that it does conduct unannounced inspections to ensure compliance with all conditions. Also, "as a condition of the Permit, all water remaining after the aggregate washing operation is required to be directed to a settling pond, and then subsequently back to the source pond." Therefore, MOE states, "the actual amount of water taken from the aquifer is expected to be considerably less than that specified by the Permit."

MOE has also argued that even though the material washed from the gravel may contain some fine material, it will settle to the bottom of the on-site settling pond. "The fine material will be retained at the bottom of the settling pond" because "the speed of the groundwater flow is too low to transport solid materials through the aquifer."

Public Participation & *EBR* Process

The PTTW proposal was posted on the Registry on February 12, 2004 for a 30-day comment period. Eight different submissions from 106 people (including a petition signed by 100 people) were received and all voiced concerns over the proposal.

MOE summarized specific comments into twelve main themes. Among the themes that MOE addressed were: the water might not be reused and/or might be used for a different purpose, including sales; the aggregate washing might result in clogging of the subsurface with fine material; the source pond might be expanded in size to create a 20-acre "lake"; and the water taking might result in adverse effects to the water table at surrounding wells as well as at the neighbouring wetlands and lakes.

MOE addressed these concerns by stating that the use of water for other purposes would be a "contravention of the *Ontario Water Resources Act*"; the speed of the groundwater flow is too low to transport solid materials, including fine materials through the aquifer; the proponent must obtain approval from MNR to construct a larger pond; and the water level will drop most near the point of taking, therefore, the amount of water dropping further away is "indistinguishable."

MOE failed to address additional concerns that were raised by the residents. These included concerns over the possible effects on wildlife habitat or the disruption of the ecological balance, and concerns regarding the campground located in the immediate area that may be affected by the impaired water quality. Furthermore, a request to prolong the comment period was received by MOE but appears to have been ignored. However, MOE did agree to shorten the duration of the PTTW to two years.

MOE assured the commenters that fine materials such as silt and clay would not be re-circulated into surface and groundwater, and addressed concerns over fuel leaks from trucks. However, MOE did not address public concerns over the possibility that aggregate washing machinery might contaminate the local groundwater. The commenters feared that the water used will be contaminated with oil and re-circulated back into the dugout pond.

The public also raised concerns regarding the credibility of the hydrogeological study. Commenters argued that the study (prepared for the aggregate company by a consultant) was simplistic and questionable because it was compiled using outdated data and was unrelated to the specific site's geography. However, MOE responded by stating that the hydrogeological study was produced in support of the application and the decision was determined by reviewing the study alongside the ministry's review of the PTTW application and evaluation of the local site conditions.

SEV

MOE does not consider its Statement of Environmental Values (SEV) for instruments because the SEV was considered when the classification regulation for instruments was developed. Also, MOE stated in an August 1995 discussion paper that, "issuing, review, repeal or amendment of instruments is guided by policies, Acts or regulations." MOE maintains that since its SEV is considered in the development of MOE policies, Acts and regulations, considering it again for the granting of instruments is unnecessary.

Other Information

In July 2002, an application was made by Cedarwell to the Ministry of Natural Resources (MNR) to amend the aggregate company's site plan for the extraction of water below the water table. Concerns were raised by the public when the PTTW was granted by MOE while the site amendment decision was still pending. Commenters argued that MOE should have waited for a decision on the MNR application before authorizing a PTTW.

MOE addressed these public concerns by indicating that any "amendments to the aggregate License are administered by the Ministry of Natural Resources" and that MOE's approvals are not contingent upon the approval of another application. MOE further stated that they are "currently assisting the Ministry of Natural Resources with the evaluation of the potential for adverse effects to water resources resulting from the proposal to extract aggregate below the water table." MOE also pointed out that the "approval of this Permit will not cause the dialogue regarding the proposal to extract aggregate below the water table to be abandoned."

As of March 2005, the site amendment proposal was still being considered by MNR. MNR has indicated that a decision will be contingent upon MOE's letter of comment reviewing the hydrogeological studies conducted by Cedarwell and also upon one submitted by local residents.

In April 2005, MOE finalized a new PTTW Manual, to provide ministry staff with "direction and guidance" as to the "requirements and considerations when making a permit decision." This manual will be reviewed by the ECO in an upcoming annual report. Another related development is the new Water Taking and Transfer Regulation, which is reviewed on pages 116-120 of the 2004/2005 annual report.

ECO Comment

MOE did a thorough job of summarizing and responding to the majority of the comments on this proposal by listing 12 themes that the ministry then responded to individually. MOE added certain terms and conditions to the PTTW based on public concerns, and shortened the duration of the permit to two years.

MOE provided the public with much of the necessary background information after the fact but did not address all of the public's concerns. For instance, MOE addressed concerns regarding the clogging of the on-site settling pond with fine minerals and fuel leaks from trucks, but provided a weak response to other concerns, such as the possibility that the aggregate washing machinery may contaminate the local water supply. MOE argued that "this concern applies to any type of land use or activity" and that "it is the responsibility of all land owners to ensure that proper measures are in place to prevent leaks and spills." In certain cases, aggregate operators are required to develop spill prevention and control plans. MOE did not explain whether such a condition was required in this case. In response to the ECO's inquiry, MOE explained that a spills control plan is normally not included in a PTTW. However, in cases where the applicant also needs a sewage works approval, a spill control plan would be required. MNR staff later clarified that this aggregate site's wash plant operation has been required to maintain a spills control contingency plan since October 2003.

When concerns about the credibility of the hydrogeological study submitted by the aggregate operator were raised, MOE responded by saying that "the decision to issue a Permit to Take Water for aggregate washing was based upon the Ministry's review of the Permit to Take Water application, information contained in the hydrogeological study, and evaluation of the local site conditions." The absence of independent, up-to-date analyses of local hydrogeological conditions is often a concern for members of the public in such situations. The adequacy of the ministry's information on groundwater resources has been widely debated in recent years, as part of a larger debate on the need for a source protection approach for drinking water. New legislation is expected to be introduced in the fall of 2005 that will require (among other things) the development of Source Protection Plans on a watershed level, that will identify well-head and intake protection zones, significant recharge areas and other vulnerable areas. Hopefully, in coming years, MOE and municipalities will have access to such background information.

The PTTW does stipulate that in the event of an observed negative impact on the water supply, the proponent must either provide an equivalent amount of water to the residents, compensate the residents, or reduce the amount of water taken. In other cases, MOE has included a condition where the Director is given the power to suspend or reduce the taking of water. Also, in MOE's recently finalized PTTW Manual, MOE suggests that during low water conditions, the Director "will consider whether to issue the permit and/or may impose specific conditions on a permit, including requiring the applicant to develop a schedule for water takings, conditions on the storage of water, and a 10 to 20 per cent reduction in the water taking." However, this approach only applies when the "Director is considering whether to issue or impose conditions on a permit" but does not appear to apply to existing permits. It is not clear whether

MOE considered this approach in the case of this PTTW. However, MOE could have referred to the 2001 *Ontario Low Water Response Plan* (LWR Plan), which might have addressed some of the public's anxiety. As mentioned in the ECO's 2000-2001 Supplemental report, the LWR Plan allows the government to take steps to respond to drought conditions including intervening in cases of "extreme drought".

Based on a small sampling of new PTTW proposals on the Registry as of February 2005, it appears that MOE does not provide hyperlinks to draft versions of PTTWs at the stage when members of the public are invited to comment. This information is, however, available at the nearest district MOE office by request. This makes it challenging for the public to provide informed comments, because they have to make a special trip during a short comment period to get the necessary detailed background information, such as conditions that the ministry may plan to impose. In this case, the ministry also did not provide the hydrogeological study or an evaluation of the local site conditions on the Environmental Registry but it would have been available at the nearest district office upon request. One alternative MOE might consider is including a list of potential conditions that might be included in the final PTTW at the time of the initial proposed PTTW. The public would then have the opportunity to understand what MOE is considering and would have more information to contribute to the decision making process.

Once a decision is posted on the Registry, a hyperlink to the PTTW is available to the public that provides all the terms and conditions of the permit, as well as the required summary of public concerns and how the ministry addressed those concerns. This is important and helpful information, but cannot address the public's need to be informed at the proposal stage. The ECO encourages the ministry to improve its process for public consultation on PTTWs through the Registry, by providing draft permit conditions to the public at the time of consultation.

Review of Posted Decision:
Approval of the Certificate of Approval for the Edwards Landfill Site

Decision Information:

Registry Number: IA04E0887	Comment Period: 30 days
Proposal Posted: December 7, 2004	Number of Comments: 155
Decision Posted: February 14, 2005	Decision Implemented: February 10, 2005

Description

On February 10, 2005, the Ministry of the Environment (MOE) approved an amendment to the provisional certificate of approval (C of A) No. A110302 for the Edwards Landfill site in Haldimand County under the *Environmental Protection Act* (*EPA*). Prior to the amendment, the C of A specified a maximum daily fill rate of 10 tonnes of solid non-hazardous municipal waste from Haldimand County. With the approval of this amendment, the site is authorized to also accept a maximum daily fill rate of 490 tonnes of solid non-hazardous industrial, commercial and institutional (ICI) waste from across Ontario.

The Edwards Landfill site operated from 1959 to 1977 during which time municipal waste was deposited into shallow unlined trenches. Between 1977 and 2004, the site was used intermittently. The first C of A for the site was issued in 1971 and specified a maximum daily fill rate of 10 tonnes. C of A No. A110302 was issued in 1980 and replaced the 1971 C of A. C of A No. A110302 has been amended a couple of times to reflect a change in ownership of the site and to document that the waste disposal volume (capacity) of the original site has been calculated to be 624,065 cubic metres. The Edwards Landfill site is within the Six Nations of the Iroquois Confederacy (Six Nations) tract and traditional territory which is the subject of outstanding land claims. It also neighbours an Area of Natural and Scientific Interest (ANSI), abandoned gypsum mines and a provincially significant wetland.

After conducting a site investigation and waste characterization study in 2001, the C of A was amended in 2004 to allow for the redesign of the site to current standards for landfill design and operation without increasing its original capacity. Since there is historical evidence that substantial quantities of hazardous waste were deposited at the site, the decommissioning plan for the existing waste disposal areas requires that the hazardous waste materials be segregated and disposed offsite. The new design for the site includes a leachate collection system that will be installed above a liner.

The 2004 amendment also required a Public Liaison Committee (PLC) be established "as a forum for dissemination of information, consultation, review and exchange of information regarding the operation of the site, including environmental monitoring and maintenance, complaint resolution and review of new approvals or amendments to existing approvals related to the operation of the Site."

The 2005 amendment requires the owner/operator, Haldimand-Norfolk Sanitary Landfill Inc., to begin decommissioning the former waste disposal area by March 11, 2005. Since this area contains hazardous waste, the owner/operator was required to excavate the waste and backfill the excavated area with clean uncontaminated soil. The owner/operator was then required to remove the liquid and hazardous waste from the excavated waste and dispose it at an appropriate licensed hazardous waste disposal facility. Solid non-hazardous waste in the excavated waste may be deposited in the newly developed clay-lined area of the site.

The 2005 amendment also includes three new conditions related to traffic control in the area. For instance, it requires the owner/operator to assess the suitability of Brooks Road, which is the access road to the site, to sustain the traffic volumes and to submit its findings including a proposal for any required upgrades and an implementation schedule to MOE and the County of Haldimand. In addition, trucks carrying waste from outside of the local area are required to use only the roads named in the C of A.

Implications of the Decision

This decision represents a significant change to the daily fill rate and nature of the waste that the site can accept. A 50-fold increase in the maximum daily fill rate effectively changes the site from a local municipal waste site to one that can accept ICI waste from across the province. Although the capacity of the site has never changed according to MOE, the increase in the maximum daily fill rate means that there will be a significant increase in the truck traffic in the area. Due to a previous amendment that requires the site to upgrade its environmental protection measures, particularly with respect to the management of leachate, negative effects of this increase in the daily fill rate should be mitigated, at least with respect to groundwater.

Public Participation & *EBR* Process

The proposal was posted on the Environmental Registry for the first time in June 2004 with a 30-day comment period. MOE subsequently reposted it in December 2004, again with a 30-day comment period during which MOE received 155 comments. Due to the number of comments, MOE provided a link in the decision notice to a separate document summarizing the comments and explaining how they were considered. The summary document also includes MOE's summary of numerous comments it received related to the 2004 decision. Some of the comments are discussed below.

Some commenters requested that MOE extend the comment period on the December 2004 proposal since it coincided with the Christmas holidays. Furthermore, although the site is within the Six Nations tract and traditional territory and is the subject of an outstanding land claim, Six Nations was not notified of the proposal, nor was it included in the public consultation process. MOE advised that the application to increase the daily fill rate was the subject of two proposals on the Registry for notice and 30-day comment period. The first proposal was in June 2004 and the second in December 2004. In addition, two open houses were held in 2004 and a Public Liaison Committee has met regularly since September 2004. (According to various media reports, MOE did indicate that it would consider all comments received prior to making its decision in February 2005, which effectively increased the comment period by several weeks.)

Commenters also requested that MOE require a full environmental assessment or a hearing before the Environmental Review Tribunal (ERT) since the proposal is a fundamental change to the original C of A. MOE advised that it had received a number of requests to designate the undertaking under the *Environmental Assessment Act* (*EAA*), but had decided that the issues raised would be adequately addressed by other legislation and the C of A. According to MOE, the increase in the daily fill rate to 490 tonnes of ICI waste is not the equivalent of the disposal of domestic waste of not less than 1500 persons and therefore does not trigger a mandatory hearing before the ERT under s. 30 of the *EPA*.

Commenters also expressed concern that landfill leachate may migrate off-site into adjacent Land Trust properties including an area designated by the Ministry of Natural Resources (MNR) as an Area of Natural and Scientific Interest. Commenters requested that MOE consider the potential impacts of leachate and exhaust emissions on the surrounding flora and fauna. MOE noted that it does not expect the increase in the amount of waste deposited at the site will affect the quantity or quality of the leachate generated. However, it will require the owner to monitor ground and surface water and to conduct air and dust monitoring programs. MOE advised that, based on the reports provided by the owner assessing the environmental impacts including those raised by the commenters, the redesigned site would "meet the ministry's regulations and guidelines to protect groundwater, surface water and the natural environment."

Commenters also expressed concern that the increase in truck traffic would damage local roads that were not designed for such traffic, and that truckers would use shortcuts rather than the routes analyzed in the "Traffic Impact Studies" report. MOE advised that the Ministry of Transportation reviewed the report and concluded that the anticipated impacts were acceptable. The County of Haldimand also reviewed the report and requested that the owner be required to conduct an assessment of the suitability of Brooks Road. MOE indicated that it had included this request as a condition in the amended C of A.

In its summary of the comments, MOE noted that a number of issues were identified by commenters that were not related to the proposal to increase the fill rate but were considered when MOE approved the site's Design and Operations Plan in May 2004. In response to concerns that there are gypsum mines in the area, MOE noted that the owner was aware of this issue and had confirmed that there is one mine on an adjacent property but had not found any evidence of mine shafts or tunnels on the site. Despite these findings, MOE added two conditions to the 2004 amendment to the C of A which require the owner to conduct further studies related to this issue.

In response to concerns about the potential negative impact on Lakes Erie and Ontario, MOE noted that redesign of the site to current landfill standards may improve the protection of water resources and will meet MOE's groundwater and surface water protection policies including the Provincial Water Quality Objectives. In addition, a commenter observed that the site appeared to contravene the *Adams Mine Lake Act* (*AMLA*). In response, MOE noted that the *AMLA* does not apply to the site since the area of surface water anticipated at the site will be less than one hectare and is therefore exempt under the Act. For additional information on the *Adams Mine Lake Act*, refer to pages 95-96 of the 2004/2005 annual report and pages 59-61 of the Supplement.

SEV

MOE does not consider its Statement of Environmental Values in deciding to issue instruments. MOE takes this position on the basis that staff consider the ministry's SEV in the development of instruments – considering it again for the granting of instruments is not necessary.

Other Information

The proposals to redesign the Edwards Landfill Site and to increase the maximum daily fill rate have been quite controversial. Several groups including the County of Haldimand, the Grand River Conservation Authority (GRCA), Six Nations and a local citizens group called Haldimand Against Landfill Transfers (HALT) have all voiced concerns about the proposals.

In November 2004, the Corporation of Haldimand County passed a resolution petitioning MOE to require a full environmental assessment prior to approving the 2005 amendment, to ensure that there is a condition in the C of A that requires the operator to comply with all environmental regulations, standards and legislation, and to reopen a comment period of 90 days. The county identified concerns related to the size and scope of the amendment, potential environmental risks due to the possible existence of abandoned gypsum mines on the site, presence of provincially significant wetlands on the site. Since the original C of A was approved before many of today's environmental requirements were enacted, it is exempt from many of these requirements, according to the county. Furthermore, the county believes that approval of this amendment contravenes the principles of source protection planning and may endanger the health of residents.

A hydrogeologist hired by HALT concluded, in January 2005, that 7.5 million litres of leachate may be leaking from the existing landfill site and may contain contaminants such as benzo(a)pyrene, naphthalene, benzene and xylenes in concentrations many times higher than allowed by the Ontario Drinking Water Standards and Provincial Water Quality Objectives.

In March 2005, HALT filed a leave to appeal under the *EBR* of the decision by the MOE Director to approve the amended C of A that increased the daily fill rate to 500 tonnes. According to HALT, the grounds for the leave to appeal included the lack of experience by the owner, failure to comply with the terms and conditions of a previous amendment to the C of A, inadequacies in the site decommissioning plan and the traffic impact study that could result in significant harm to the environment, and the fundamental unsuitability of the site due to its hydrogeology and proximity to provincially significant wetlands. HALT also identified the approvals process that allowed a series of approvals designed to circumvent the public hearing provisions of the *EPA* as grounds for its leave to appeal. Also seeking leave to appeal the decision, Six Nations has identified aboriginal and treaty rights, an existing land claim and other concerns as grounds for its leave to appeal. As of May 2005, decisions by the ERT on both leaves to appeal are pending.

In April 2005, the ECO received an application for review from the GRCA requesting the ECO review the process used to amend Cs of A to allow the alteration, extension, expansion or enlargement of dormant landfill sites. The GRCA notes that amendments to existing Cs of A for dormant landfill sites to permit reactivation of the sites are exempt from the public participation requirements under the *EAA*. The GRCA contends that the Edwards Landfill site C of A has been amended several times over the last few years in a piecemeal manner "without a comprehensive review of the project or resulting environmental impacts." A 2003 request to designate the undertaking under the *EAA* from the GRCA was denied by MOE explaining that re-opening the site was a "redesign of the approved landfill from 1971 as no expansion of the approved capacity or footprint was being sought."

In late July 2005 HALT filed a judicial review application challenging MOE's approach to approvals for the landfill site granted to the proponent since 2002. The grounds for the application are that the MOE Director "exceeded his jurisdiction when he increased the capacity and service area of the landfill," approving the establishment of "a large new landfill without a public hearing, as required by section 30(1) of the Environmental Protection Act." The ECO will monitor this case and provide an update on it in our 2005/2006 annual report.

ECO Comment

The ECO notes that MOE complied with the public participation rights under the *EBR* and provided a comprehensive summary of how it considered comments received on this proposal. The ECO commends MOE for explaining how comments unrelated to the subject proposal had been addressed in the decision to approve the site redesign. Since the Edwards Landfill Site is privately owned, it is not subject to the *EAA* unless the undertaking is specifically designated by the Minister of the Environment. However, it is subject to the public participation rights defined in the *EBR*. Due to the number of requests for additional time to comment and for an environmental assessment, and since the comment period occurred over Christmas, the ECO believes that MOE should have formally extended the comment period or provided enhanced public participation such as public meetings or mediation under s. 24 of the *EBR*.

Furthermore, the ECO does not understand why the increase in the daily fill rate did not trigger a requirement for an ERT hearing under s. 30 of the *EPA*. The amount of ICI waste approved for this site is substantially greater than the amount of waste produced by 1500 persons in a year. The ECO urges MOE to clarify how it applies s. 30 of the *EPA* to waste streams other than domestic waste.

The ECO notes that the history of the Edwards Landfill Site has a number of similarities to that of the Egremont Landfill Site that was the subject of an application for review in 2004. Both sites were approved as waste disposal sites in the early 1970s when the rights of the public to be notified and consulted about proposals were at the discretion of the government. The approvals for both sites did not require the owner/operator to use a leachate containment system or to install a liner. Years later, the Cs of A for both sites were amended to document their "original" waste disposal volume which was information that was not included in the original approvals. The effect of these amendments is that the more stringent landfill requirements defined in O. Reg. 232/98 under the *EPA* for leachate management do not apply to these sites unless the owner/operator requests an increase in the waste disposal volume of their sites. In the early 2000s, further amendments were made to each site's C of A that resulted in a significant expansion of their effective service areas but not to the waste disposal volumes of the sites, despite numerous concerns raised by local residents. In both instances, MOE denied requests for the undertakings to be subject to full environmental assessments under the *EAA*. MOE's decision to approve the amendment to the Egremont C of A became the subject of an application for review, and the Edwards C of A of two applications for leave to appeal under the *EBR*. It has also triggered an application for review from the GRCA of MOE's approval process for dormant landfill sites. For additional information about the application for review of the Egremont C of A, refer to pages 244-248 of this Supplement. The ECO will review the GRCA application for review after a decision has been made.

Review of Posted Decision:
Pre-treatment of Hazardous Waste: Development of Regulatory Framework

Decision Information:

Registry Number: PA01E0027
Proposal Posted: December 18, 2001
Decision Posted: March 19, 2004
Comment Period: 90 days
Number of Comments: 23
Decision Implemented: March 19, 2004 (date discussion paper was finalized)

Description

Introduction

Since December 2001, MOE has been consulting on its plans to reform and strengthen the management of hazardous waste in Ontario by prohibiting the land disposal of untreated hazardous wastes. In a media release issued at that time, the previous government announced that it planned to introduce into regulation treatment standards for hazardous waste which are "at least as tough as those in the United States." The current government announced its intention to do the same in November 2003 and again in September 2004.

This article reviews MOE's decision of March 2004 to proceed with the *development* of an LDR program for Ontario but *not* the program itself, since revisions to Regulation 347 detailing the new LDR rules were not finalized until August 2005. The ministry's consultation process on this issue has involved several postings to the Registry over a four-year period. First, in December 2001, MOE posted a proposal notice about a discussion paper for a program to more tightly regulate the land disposal of hazardous waste in the province ("2001 discussion paper"). Then, in March 2004, MOE announced its decision to move forward with the development of such a program, posting a decision notice on the Registry. Following direct discussions with stakeholders between April and June 2004, MOE posted an information notice soliciting public comments in July 2004. The information notice provided a link to a framework document which further developed the ministry's proposal ("2004 framework document"). More recently, in September 2004, MOE posted its proposed revisions to Regulation 347 on the Registry as a proposal notice. Since MOE took the unusual step of providing a public comment period on its July 2004 information notice, the ECO has also reviewed the comments MOE received on it. The table below indicates how MOE used the Registry to consult on this program for hazardous waste disposal.

Consultation Document	Type of Environmental Registry notice used	Date proposal was posted on Registry	Date decision was posted on Registry
Discussion Paper	Regular policy notice	December 2001	March 2004
Framework Document	Information notice	July 2004	No decision or update posted
Revised Regulation 347	Regular regulation notice	September 2004	August 2005

MOE's new approach is based on a concept called Land Disposal Restrictions (LDR). The concept was first developed in the mid 1980s in the U.S. The U.S. LDR program applies to all subject hazardous wastes which are land disposed on-site at private facilities by generators and off-site at commercial facilities in the U.S. Land disposal is defined to include disposal in landfills, injection wells and other structures within land, and through landfarming and other on-land methods. The U.S. hazardous waste regulation specifies conditions under which time-limited exemptions and other exceptions may be granted, such as situations where there is inadequate pre-treatment capacity and where alternatives to prescribed treatment technologies become available.

Landfarming is a practice used to reduce the concentration of contaminants in petroleum wastes through biodegradation. Also known as land treatment or land application, it is an above-ground technique which involves spreading contaminated material on a thin layer of soil and stimulating aerobic microbial activity within the soils through aeration and/or the addition of minerals, nutrients, and moisture.

Injection wells are holes bored or drilled into porous formations of rocks, such as sandstone or shale, which are used for the underground storage of fluids.

Ontario had already adopted a key component of the U.S. approach to the regulation of hazardous waste in October 2000, when MOE amended Regulation 347 to put in place the U.S. system for identifying and classifying hazardous waste (for further information, refer to page 103 of the ECO's 2000/2001 annual report). In doing so, MOE adopted a more rigorous test for leachate toxicity (but added even more contaminants to the leachate quality criteria list than apply in the U.S.) and added new wastes and chemicals to the schedules in the regulation. MOE also incorporated the U.S. "derived from" rule – which states that listed hazardous waste is still a hazardous waste after treatment and therefore must be disposed in a hazardous waste landfill – as well as the U.S. provisions for "delisting" waste if it can be proven that the treated materials are no longer hazardous. While the October 2000 changes harmonized the *definition* of hazardous waste in Ontario with that of the U.S., the present proposal would align the approaches to the *management* of hazardous waste in the two jurisdictions.

Characteristic and Listed Wastes. Under Regulation 347, and the U.S. hazardous waste regulation regime, wastes are deemed hazardous either because they are specifically listed in a schedule to the regulation ("listed wastes" such as PCBs and benzene) or because tests, which are set out in the regulation, show that the waste is ignitable, corrosive, reactive or "leachate toxic" ("characteristic wastes"). Leachate toxic waste is hazardous waste which is likely to leach contaminants into groundwater.

Detailed Description

In December 2001, MOE issued a discussion paper, entitled "Pre-treatment Requirements for Hazardous Waste Prior to Land Disposal," ("the 2001 discussion paper") in which it proposed to more tightly regulate the land disposal of hazardous waste in Ontario through amendments to Regulation 347, R.R.O. 1990, the General Waste Management Regulation under the *Environmental Protection Act (EPA)*. The proposed change would mean that hazardous waste could only be disposed of in or on land in the province after being treated to certain standards to reduce its mobility or toxicity. With some exceptions (e.g., for sewer discharges and household hazardous wastes), the proposed new requirements would apply to both listed and characteristic hazardous wastes. The proposed change is based on the principle that if technologies are available to render hazardous waste destined for land disposal less harmful, they should be employed. According to the ministry, approximately 30 per cent of the hazardous waste generated by Ontario's industries is land disposed. A portion of the hazardous wastes imported into the province is also land disposed.

This policy proposal would establish an additional layer of requirements for hazardous waste generators, landfill operators and other kinds of hazardous waste managers, supplementing MOE's risk-based site-specific approach to the approval of new and expanding landfill sites in the province. As outlined in MOE's Reasonable Use Guideline for groundwater management activities, the current approach establishes allowable concentration limits for contaminant releases from landfills based on background contaminant levels and groundwater uses at adjacent properties. Proponents are required to design landfills to ensure that the applicable limits – set by MOE at the "no significant effect" level – are met.

In its 2001 discussion paper, MOE described the U.S. LDR program and implied that Ontario's LDR program would draw on its key elements of scope and design. The paper explained that the U.S. regulation sets out a series of schedules of pre-treatment standards including:

1. Three which are organized by waste stream, indicating the treatment standards for all listed hazardous waste constituents found in each stream;
2. One which lays out standards for determining leachate toxicity;
3. One which is organized by waste stream, indicating treatment standards for all characteristic wastes; and
4. One which lists treatment standards, known as the Universal Treatment Standards (UTS), for each listed hazardous waste chemical.

Most of the standards, including the UTS, are "contaminant-based" standards, consisting of numeric concentration limits for constituents of hazardous waste in post-treatment residues. The remainder are "technology-based" standards, prescribing the use of one of 30 different specific technologies. Both the contaminant-based and the technology-based standards were derived from best demonstrated available technologies (BDAT). The U.S. LDR program also includes alternative, less stringent standards for certain wastes which do not result directly from industrial processes, such as debris and contaminated soils. Alternative standards for remediation wastes were adopted so as not to discourage contaminated site clean-up. Under the U.S. program pre-treated *listed* hazardous waste must be disposed in hazardous waste landfills (unless it is delisted), while pre-treated *characteristic* hazardous waste can be disposed in non-hazardous waste landfills. In addition to its central prohibition regarding hazardous waste disposal, the U.S. program also includes prohibitions on hazardous waste dilution, to prevent wastes from being diluted to mask the concentration of hazardous constituents, and on storage, to prevent indefinite storage of hazardous wastes.

MOE's discussion paper proposed to adopt the U.S. definition of land disposal (i.e., to include landfilling and landfarming). While MOE implied that Ontario's LDR program would draw on other key scope and design elements of the U.S. program, the ministry specifically proposed to depart from the U.S. program in one regard. Instead of incorporating the series of treatment standard schedules employed in the U.S., MOE proposed to simply adopt the UTS (i.e., only number 4 above) and therefore to only adopt one of the U.S. schedules, stating that a primarily UTS-based approach to the standards would be more straightforward to implement. However, the discussion document did not elaborate on certain aspects, such as the standards which would apply to the treatment of characteristic wastes (as the UTS do not include standards for such wastes). The discussion document did not describe the requirements for testing, certification and reporting and how they would interface with systems already in place. Nor did it specify whether MOE intended to adopt alternative treatment standards for special waste streams or include prohibitions on dilution and storage.

The ministry did make some specific proposals regarding program implementation, proposing to introduce the requirements in a phased manner based on Ontario's current pre-treatment capacities. Standards for inorganic and organic wastes would take effect one and two years respectively after the filing of the regulation. MOE also proposed to require that all imported hazardous waste meet any pre-treatment standards applicable in the jurisdiction of origin, effective immediately upon adoption of the regulation.

The ministry specifically sought public input on: its proposal to adopt the UTS; how to address special circumstances; the current capability and capacity of hazardous waste treatment facilities in the province and industry's willingness to increase it; and how and when the LDR pre-treatment standards for various wastes should be phased in. The ministry also stated in its 2001 discussion paper that it was committed to full public consultation on a draft regulation through the Environmental Registry.

In March 2004, MOE updated its 2001 proposal notice to indicate its decision to proceed with the development of a LDR program for Ontario. However, the ministry stated that it had not made decisions regarding the scope and implementation of the program, noting that it had not received input on all of the questions posed and that there was "no clear consensus on how to proceed." The ministry explained that additional direct stakeholder consultation was necessary to determine, among other things, the extent of interest in developing the required new technologies. The ministry reiterated its commitment to use the Registry to fully consult on a draft regulation for the program following such consultations.

Subsequently, in July 2004, MOE issued another document, entitled "Land Disposal Restrictions Framework for a Regulation" ("the 2004 framework document"), which outlined in much greater detail a proposed LDR program for Ontario and solicited public input on it through an information notice posted on the Registry (XA04E0010). The 2004 framework document articulated the ministry's plan to amend Regulation 347 to include a prohibition on dilution and restrictions on storage, and outlined the safety and reporting requirements applicable to all stored liquid industrial and hazardous wastes, including those not destined for land disposal. MOE clarified that it intended to implement alternative treatment standards for contaminated soils, debris and lab packs. It also outlined notification, certification and reporting requirements and conveyed its plan to address special cases through exemptions granted through a certificate of approval (C of A) process.

The 2004 framework document did not reiterate MOE's proposal made in its December 2001 discussion paper to adopt the contaminant-based UTS. Rather, it indicated that MOE planned to adopt the full set of schedules of standards employed in the U.S. which include both contaminant-based and technology-based standards. Although MOE proposed to adopt the full set of schedules, the framework document did not specify what standards would apply in situations where a waste is deemed leachate toxic due to the presence of leachate quality criteria adopted in Ontario but not the U.S. The 2004 framework document did not specify a proposed phase-in schedule, but simply stated that the ministry believes that "the program could not be fully implemented in less than two years" as there are capacity and other implementation issues to address. It did not mention MOE's previous proposal to require that imported hazardous wastes be pre-treated to the standards in place in the jurisdiction of origin.

Several months later, in late September 2004, MOE posted a regulation proposal notice about the proposed LDR amendments to Regulation 347 and included a link to a draft amended regulation (RA04E0016). The proposed program outlined in the draft regulation did not differ from the approach outlined in the framework document, except that it included a revised implementation timeline. While the original timeline committed MOE to implement pre-treatment standards for inorganic and organic wastes within one and two years respectively after filing of the regulation, the revised timeline called for inorganic and organic wastes to be subject within two and three years respectively of filing, with complete implementation achieved five years after filing. The notice also clarified the treatment standards that would apply to hazardous wastes defined as leachate toxic in Ontario, but not in the U.S., for those criteria applicable in Ontario only. MOE also proposed, for the first time, to exempt small quantity generators, by adopting the same cut-off triggers as in the U.S. The ministry estimated that the exemption would only apply to 0.5 per cent of the subject hazardous waste generated in the province. The regulation proposal notice also included MOE's first public projections of the expected costs, including their distribution, to industry.

Implications of the Decision

In its Registry proposal and decision notices, MOE stated that there would be both environmental and economic advantages to adopting a LDR program in Ontario. According to the ministry, the program should decrease both the concentration and quantity of organic hazardous waste going to landfills. MOE does not expect the quantity of landfilled inorganic wastes to decrease, however, since the volume of these wastes increases as a result of the pre-treatment methods commonly used. MOE predicted that the LDR program would also benefit Ontario's environment by decreasing the quantity of hazardous waste entering the province, particularly from the U.S. According to the ministry, it would discourage U.S. generators from exporting their wastes to Ontario to avoid more stringent and costly requirements in the U.S. In our 2000/2001 annual report, the ECO noted that differences in landfilling standards between the two jurisdictions has been identified as one of several reasons why imports of hazardous waste from the U.S. grew between 1994 and 1998. Other factors have included much lower handling and treatment costs, exacerbated by the low value of the Canadian dollar relative to its U.S. counterpart.

MOE also stated that an LDR program will have pollution prevention spin-offs, providing incentive to Ontario industries to generate less waste due to the additional costs involved in managing them. In addition, MOE predicted that an LDR program would provide economic opportunities for businesses to develop appropriate technologies capable of treating wastes to meet the new standards.

MOE discussed the costs of the proposal to Ontario industries in its September 2004 regulation proposal notice, predicting, based on 2002 data, that LDR program requirements would apply to approximately 95,000 tonnes of hazardous waste generated in Ontario by approximately 3,200 hazardous waste generators. The program would have the greatest impact on those industries generating the greatest quantities: the primary metal, fabricated metal product, transportation equipment, refined petroleum and coal products and chemical and chemical products sectors. MOE estimated the total costs to Ontario generators at between $30 and $50 million annually, with pre-treatment costs for particular waste streams ranging from $150 to over $1000 per tonne, depending on waste type, quantity, and treatment method.

Public Participation & *EBR* Process

Discussion Paper, December 2001 (PA01E0027)

MOE posted its notice about the discussion paper on the Environmental Registry in December 2001, providing a comment period of 90 days. In response, 23 sets of comments were submitted from residents, environmental and health groups, industries and industry associations.

A number of Ontario residents and environmental and health groups agreed that an LDR program should be adopted immediately as current hazardous waste landfarming and landfilling practices pose threats to ground and surface waters and cause noxious odours and hazardous air emissions. Moreover, an LDR program in Ontario would assist Canada in meeting its obligations under the "Basel Convention on the Transboundary Movement of Hazardous Wastes and their Disposal" and may halt the trend of increasing hazardous waste imports to the province. Several commenters, among them Sarnia-based residents and groups, stated that generators should pre-treat hazardous wastes on-site or locally to reduce its transport throughout the province. One business group supported this approach, stating that MOE should structure its hazardous waste charges so as to encourage on-site treatment systems.

Several residents and environmental groups raised concern about the potential of the LDR program to increase the incineration of hazardous waste and highlighted the need for more rigorous operating and emissions standards for facilities burning hazardous wastes for destruction or as fuel, similar to those adopted in the U.S. in 1999. (These issues are discussed further below.) Several proponents of the LDR proposal also insisted that industry and government must provide key information about waste quantities, treatment systems and emissions to public and community groups.

Some waste generators and waste management companies took issue with MOE's focus on the landfilling of hazardous waste, stating that the ministry should direct its efforts towards hazardous waste reduction and recycling initiatives, either instead of, or simultaneous with the implementation of an LDR program. According to them, the ministry could achieve its objective of environmental protection most effectively and cost-efficiently through these alternative approaches.

A number of industry commenters asserted that the Ontario program should include provisions and appropriate incentives for treating wastes to levels beyond the minimum standards to make the waste acceptable for disposal in non-hazardous waste landfills. Processes which are not overly burdensome should be put in place for "delisting" listed hazardous wastes when technologies to render hazardous wastes non-hazardous become available. Failure to do so may lead to unnecessary environmental risks, for example, if wastes are incinerated when they could otherwise be treated using cleaner technologies. Industry commenters also suggested more conventional ways of regulating hazardous waste, including through a risk-based approach, similar to what is currently in place in Ontario, and contingent management, whereby waste management companies have the option of pre-treating waste prior to disposal or upgrading a landfill.

Many industry stakeholders remarked that the 2001 discussion paper required much more research, analysis and consultation. According to them, MOE did not sufficiently support its assertions that an LDR program would provide environmental benefits and reduce the volume of land-disposed hazardous waste and imports to the province. Some industry commenters remarked that the program will have significant impacts on Ontario industries and urged MOE to provide a cost-benefit analysis to justify the additional costs. Many industry commenters drew attention to certain aspects of the program which the discussion document did not discuss, including whether Ontario's program would include a prohibition on dilution and requirements for testing, tracking, and certification.

Some industry commenters discussed the need for exemptions from the LDR program for small quantity generators or particular sectors based on the availability of alternative treatment technologies. Industry associations representing the petroleum sector asserted that MOE should exempt petroleum wastes, currently managed on-site at landfarms, from all pre-treatment requirements. According to the associations, landfarms undergo a rigorous approvals process and already meet MOE's environmental objectives by reducing the amount of landfilled hazardous waste. One association made the claim that landfarms are permitted in the U.S. (MOE disputes this.)

Most industry and business groups responded to some or all of MOE's specific questions about the design and implementation of Ontario's LDR program. While some supported the adoption of the UTS standards, most stated that the program should include technology-based standards for some contaminants, as in the U.S. program. One commenter explained that technology-based standards obviate the need for the costly testing required to determine compliance with contaminant-based standards.

A number of industries registered support for the adoption of exemptions, variances and extensions, especially in cases where adequate treatment capacity cannot be made "reasonably" available in the province. However, one out-of-province soil remediation company stated that MOE should consider the available capacity in other jurisdictions in making decisions to issue capacity variances.

Waste generators raised concerns about availability of adequate pre-treatment capacity and challenged MOE's position that capacity will be created in response to the adoption of new standards. Safety Kleen (now Clean Harbours), Ontario's largest commercial hazardous waste management company, stated that its own current capacity to pre-treat hazardous waste is limited. The out-of-province soil remediation company indicated that, while capacity to treat contaminated soil in Ontario is limited, there is an over-capacity in North America. Many industries stated that MOE should first provide information on the volume of Ontario's various hazardous waste streams before asking for input on industry's willingness to develop additional pre-treatment capacity. One waste management company claimed that if MOE's objective is to reduce the volume of waste generated there is no incentive for investment in pre-treatment technologies.

A number of companies did express interest in developing treatment capacity in Ontario as long as supportive regulatory and economic conditions are in place. They stated that expansions would entail significant capital investment and permit modifications and encouraged MOE to avoid burdensome permitting requirements and protracted timelines. One waste management company remarked that MOE should address an imbalance in the application of the *Environmental Assessment Act (EAA)*, noting that large commercial disposal facilities must conduct multi-year, cumbersome environmental assessments while generators – large and small – that treat wastes on-site are exempt from the requirements of the Act. According to a waste management company, any commitment to develop additional capacity must be met by MOE's consistent enforcement of Regulation 347 and related waste regulations.

Numerous industry commenters remarked that MOE should also consider other capabilities and capacities necessary to implement the program, including the need for adequate and well-trained ministry staff and appropriate information management systems. Also, they questioned whether there is adequate capacity at laboratories in the province to support the analytical requirements for Ontario's estimated 17,000 hazardous waste generators.

Most industries and businesses stated that the requirements should be introduced only after appropriate pre-treatment facilities are in place and that MOE's proposed phase-in schedule is too short, as it can take in excess of five years to get a waste facility approved. One waste management company indicated that it believes that all hazardous waste managed in Ontario – whether generated in the province or not – should meet the LDR requirements at the same time and that MOE's proposed approach would be inconsistent with NAFTA and other trade agreements. Another company stated that MOE's proposal regarding imports may be simply too complicated to implement.

MOE's decision notice about the December 2001 discussion document provided a brief summary of the basic positions expressed by commenters. The decision notice indicated that environmental groups and the general public supported the proposal, however, it did not summarize any of their concerns, such as those related to incineration, or indicate whether and how the concerns might be addressed. Furthermore, while the ministry did not specifically note or explain how many of the concerns of industry or business groups were addressed, a reading of the framework document and the proposed regulation suggests that the ministry did factor in a number of the points that they raised (refer to the Description section above).

Land Disposal Restrictions Framework for a Regulation, July 2004 (XA04E0010)
As noted, MOE posted a framework document on an LDR program for Ontario as an information notice in July 2004. The notice stated that "Public comment on this information would be helpful to assist the [m]inistry as it drafts a land disposal restriction regulation," yet MOE provided only a 9-day comment period on the information notice during the traditional summer holiday season, instead of posting a regular notice with a minimum 30-day comment period as required. Moreover, the notice did not convey in any way that changes had been made to the proposed program since its first articulation in the December 2001 discussion paper. While their positions on the framework document differed, all six organizations which submitted comments – three environmental groups and a waste generator, industry association and waste management company – criticized MOE for providing a 9-day comment period, especially during the middle of the summer holiday season.

Overall, the environmental groups expressed strong support for the proposed program, as they did previously. One group agreed with MOE's proposal to grant exemptions on a case-by-case basis through the C of A process, stating that every exemption from the program deserves scrutiny given the potential risks to the environment. The group encouraged MOE to post all such proposed changes to Cs of A on the Environmental Registry for public comment.

However, the environmental groups did express reservations about MOE's proposal to adopt all of the standards in place in the U.S. They were particularly concerned that this would mean that Ontario would apply technology-based standards for some hazardous waste constituents, instead of taking an exclusively contaminant-based approach to the standards by adopting the UTS as originally proposed. The environmental groups stated that technology-specific standards constitute an outdated approach which can stifle the innovation of more effective technology. They encouraged the ministry to return to its original approach of adopting contaminant-based standards, setting standards at levels comparable to what can be achieved through currently available technology. These groups were particularly concerned about the proposed standards which prescribed incineration as a pre-treatment method and encouraged MOE to ensure that the Canada-wide Standards for dioxin, furan and mercury emissions are incorporated into the Cs of A of all hazardous waste combustion facilities. One commenter also encouraged MOE to adopt the more stringent U.S. standards for other key air contaminants released by these facilities as soon as possible.

Two industry groups reasserted their opposition, previously articulated in comments on the 2001 discussion paper, to the application of LDR requirements to landfarming operations. One stated that the information notice did not convey whether and how the ministry had considered their previously stated concerns about the ministry's approach to that waste management method. Once again, these groups remarked that landfarming meets the ministry's objective and that a blanket prohibition is not in the public interest. The commenters recognized that MOE intended to deal with special cases through the C of A process, but stated that the ministry had not provided guidance on what constitutes a special case.

Clean Harbours (formerly Safety Kleen) restated its position outlined in its previous comments that MOE still had not provided evidence that there is currently a problem with hazardous waste disposal in Ontario or demonstrated the program's environmental benefits. The company remarked that MOE's proposal has failed to recognize the superior levels of containment achieved in most Canadian landfills due to the clay-based terrain, compared to those in the U.S. The company also claimed that some pre-treatment technologies have been shown to be ineffective. It stated that MOE now proposes to allow the disposal of treated characteristic wastes as well as listed wastes in non-hazardous landfills and concluded that, as a result, there may actually be a greater risk to the environment than under the current approach to hazardous waste management in Ontario. According to the company, the dubious environmental benefits do not justify the great costs to hazardous waste generators that the program will entail. The company restated that there simply may not be a business case to develop many of the required treatment facilities in Ontario.

Draft Regulation, September 2004 (RA04E0016)
For its proposed LDR amendments to Regulation 347, MOE initially provided a 60-day comment period, but subsequently extended the period by about a month. Although the Registry proposal notice included some of the information about costs which the industry had been asking for, it failed to specify which aspects of the proposed regulation and revised program were new or changed. The ECO plans to review this regulation, finalized in August 2005, and the ministry's use of the Environmental Registry to consult on it in a future report.

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MOE stated that the proposed program supports its principles of environmental protection, an ecosystem approach and resource conservation. The proposed program will reduce the concentration and quantity of hazardous waste going to landfills thereby protecting key elements of the ecosystem – land, air, water and living organisms. Due to the additional costs for hazardous waste generators to dispose of hazardous wastes under the proposed program, there are economic incentives for generators to reduce waste generation as well as resource consumption.

Other Information

Information about hazardous waste in Ontario

In December 2001, MOE amended Regulation 347 in order to require hazardous waste generators to register their wastes on an annual basis (previously, registration was a one-time requirement, unless there was a significant change) in order to keep current data on hazardous waste generation in the province. The new requirement, effective January 1, 2002, was also intended to provide clearer information on quantities and types of hazardous waste generated. In our 2001/2002 annual report, the ECO stated that the re-registration requirement is an improvement, but raised concerns about the quality of information required to be submitted and pointed to some potential remaining information gaps in hazardous wastes management. In 2002, MOE responded by suggesting that it will be capturing the necessary information or that gaps identified by the ECO are small. MOE also announced that it would be conducting a review of its re-registration program within three to five years. (For further information, refer to page 54 of the ECO's 2001/2002 Supplement and page 178 of the ECO's 2001/2002 annual report).

Mercury, dioxins and furans standards for hazardous waste incinerators

MOE adopted new and more stringent Canada-wide Standards, developed by the Canadian Council of Ministers of the Environment, for emissions of mercury and emissions of dioxins and furans from hazardous waste incinerators in October 2000 and August 2001 respectively. Then, in August 2004, MOE issued its "Guideline for the Implementation of Canada-wide Standards for Emissions of Mercury and of Dioxins and Furans," applicable to hazardous waste incinerators and other facilities. The guideline requires compliance with the mercury standard by new or upgraded hazardous waste incineration facilities by 2000 and for existing facilities by 2006. Standards for dioxins and furans were to be implemented in 2001 for new or upgraded facilities and by 2006 for existing facilities. In 2003, MOE updated the C of A for the Clean Harbours' commercial hazardous waste incinerator, incorporating the new standards.

ECO Comment

The ECO is pleased that MOE has made progress in developing a land disposal restriction (LDR) program for Ontario to strengthen the province's rules for the handling and disposal of hazardous wastes. If implemented properly, the program will afford greater protections to Ontario's environment. Recommendations for such improvements to hazardous waste management in Ontario were first made over seven years ago in *EBR* applications for review submitted by the Canadian Institute for Environmental Law and Policy (CIELAP) in 1998 and 1999 and subsequently, by the ECO in our 2000/2001 annual report. Moreover, the ministry has missed its stated target completion dates. In 2001, MOE indicated that it expected to enshrine LDR requirements in regulation later that year. In September 2004, the Minister of the Environment announced her expectation that the regulation would be in place in the winter of 2004/2005.

However, the ECO believes that MOE did not provide an adequate basis for public and stakeholder comment on its proposals. First, MOE could have better outlined its rationale for the program by discussing the risks posed by current land disposal practices. In particular, information on why landfarming practices are not sound would have provided useful context.

Second, MOE should have provided relevant background information about hazardous waste in Ontario, including information on current quantities by type (e.g., organic versus inorganic) and fate (i.e., off-site versus on-site disposal via various methods including sewer, incineration and land disposal as well as through recycling). In particular, information on quantities of hazardous waste land disposed through landfilling and landfarming would have been useful. While MOE's 2001 discussion paper did discuss trends in imports and exports of hazardous waste, MOE could have also outlined time and regional trends in domestic generation. Ideally, MOE should have provided this information at the outset of its public consultations in December 2001 and again in its July 2004 framework document, to reflect the new and updated information collected as a result of its December 2001 re-registration requirements. MOE did estimate the total quantity of hazardous waste generated in the province which would be impacted by the proposed LDR program (and the cost to generators) in its regulation proposal notice of September 2004 – i.e., during its *third* Registry consultation. However, these figures were not broken down by land disposal method.

Many commenters, particularly those representing industry, expressed frustration at the dearth of basic information about hazardous waste generation in the province which was made available. As noted, the ECO has commented on the need for better information about the generation and management of hazardous waste in the province in the past.

It is clear that MOE has taken a highly consultative approach to the adoption of an LDR program since December 2001, when it first solicited public input over 90 days on its discussion document program proposal. Following three months of focused stakeholder consultations in 2004, the ministry used an information notice on the Environmental Registry to consult on a more complete and refined program proposal in July 2004 and more recently, granted a 90-day comment period for input on its proposed revisions to Regulation 347. It is apparent from the successive iterations of the proposed program that MOE has been responsive to input from commenters, particularly that of industry.

However, the ECO also believes that MOE could have done a better job of using notices on the Environmental Registry. Even though MOE used a regular proposal notice in September 2004 to consult on the draft regulation as promised, it should have employed a regular policy proposal notice to consult on its July 2004 framework document, not an information notice with a truncated comment period. As explained in our 2001/2002 annual report, if a prescribed ministry decides that it is appropriate to seek public comment on a proposal through the Registry, the correct procedure is to post a regular notice, not an information notice. Moreover, as the 2004 framework document departed from the previous 2001 discussion paper on some elements of design and implementation, the ministry would have benefited from a longer comment period, particularly given that the posting occurred during the summer holiday season. A number of stakeholders raised concerns about this use of the Registry.

The ECO also believes that MOE's Registry notices and documents should have specifically highlighted the key proposed changes to and new information regarding the design and implementation of the program from one phase of consultation to the next. In addition, MOE did not explain how it had considered and dealt with many of the positions and concerns raised by commenters, such as those from environmental groups related to incineration and industry's comments on landfarming.

The ECO plans to review the LDR regulation, finalized in August 2005, and the ministry's use of the Registry to consult on it, in a future report.

Review of Posted Decision:
Protocols for Updating Certificates of Approval

Decision Information:

Registry Number: PA02E0007	Comment Period: 60 days
Proposal Posted: May 30, 2002	Number of Comments: 13
Decision Posted: February 15, 2005	Decision Implemented: Not applicable

Description

In February 2005, the Ministry of the Environment (MOE) published the approved versions of four protocols for updating the certificates of approval (Cs of A) for Sewage Works, Drinking-Water Systems (originally called Water Works,) Air Emissions and Waste Management. The protocols document MOE procedures that were already in place in 2002. The drinking-water systems protocol was revised in 2003 to reflect new drinking-water legislation. The protocols are "intended to help clients and the public understand" the C of A updating process. MOE explained in its decision notice that since new environmental protection requirements are developed on an ongoing basis, a method was required to ensure that Cs of A, which are site-specific, are updated to reflect the new requirements. The protocols outline how and when Cs of A are updated. MOE explained that updated Cs of A will "protect human health and the environment by preventing potential harmful effects," require facilities to operate reliably, provide minimum compliance requirements and outline the responsibilities of the owners and operators. MOE plans to use the protocols to promote consolidation of multiple Cs of A, when applicable, and to improve consistency in the approvals process.

In 2000, the provincial Auditor General reported that MOE's procedures and information systems were inadequate for assessing whether and to what extent Cs of A needed to be updated with new conditions and requirements, and that MOE did not know the extent to which facilities were not meeting current environmental standards. In response, in 2001, MOE recommended that Cs of A undergo mandatory review every five to ten years and "systematic updating," and then in 2002, released the protocols in draft form. According to MOE, the protocols are part of its strategy for responding to the concerns of the Auditor General and the ECO regarding out-of-date Cs of A. However in 2004, the Auditor General reiterated the findings of the 2000 report after reviewing Cs of A for Air Emissions. MOE has advised the Auditor General that it is developing a risk-based/performance management approach to issuing Cs of A and a checklist for MOE staff to ensure that Cs of A include relevant provisions for compliance with regulations, guidelines and policies.

Since introduced in 1957, over 220,000 Cs of A have been issued by MOE and other Ontario government agencies (such as the former Ontario Water Resources Commission.) Many of these Cs of A were issued without expiry dates or renewal requirements. In 2002, MOE estimated that 120,000 Cs of A did not require updating and that 50,000 Cs of A belonged to proponents that are no longer in operation or are no longer required to have a C of A. MOE also estimated that it had insufficient information to evaluate whether or not the remaining 50,000 Cs of A required updating.

The protocols indicate that MOE will review existing Cs of A for Sewage Works, Air Emissions and Waste Management if it receives an application to amend the C of A because of proposed changes to equipment, processes, production rates or for an expansion of the plant capacity. Cs of A for Drinking-Water Systems will be reviewed if MOE receives an application for amendment or an Engineer's Report. Existing Cs of A will also be reviewed if compliance, inspection or enforcement activities identify a facility that requires more in-depth assessment. The protocols also identify which types of Cs of A will not be reviewed using this process, such as those for installations that are now exempt from requiring a C of A or that have ceased operations, unless MOE decides otherwise. If an update to the C of A is required, MOE will then determine the scope of the update using the assessment criteria defined in the relevant protocol. The assessment criteria relate to environmental protection, and standard operating, monitoring and reporting requirements. A key element of each protocol is the requirement for MOE to discuss the public health and environmental protection requirements with the facility owner before the owner submits an application to amend the C of A. MOE will review the application to ensure consistency with its environmental protection requirements and with current standard operating, monitoring and reporting requirements. It will then prepare a draft updated C of A, provide it to the owner for review and post it on the Environmental Registry for public comment when and if required by the *EBR*. If the update is initiated by MOE, the owner may not be required to prepare an application.

Protocol for Updating Cs of A for Drinking-Water Systems

Major revisions were required to the 2002 Registry proposal for the Protocol for Updating Cs of A for Drinking-Water Systems, after the *Safe Drinking Water Act* (*SDWA*) was passed in 2002 and then substantially implemented in 2003 when O. Reg. 170/03 was passed. The protocol notes that its primary purpose is to ensure "that the proposed system or amendments to the system will deliver water that is safe for consumers and meets the Ontario Drinking Water Standards." In addition to the criteria defined for all types of Cs of A, MOE will review existing Cs of A for municipal drinking-water systems to ensure compliance with the Drinking-Water Systems Regulation (O. Reg. 170/03) and the Ontario Drinking-Water Quality Standards Regulation (O. Reg. 169/03) made under the *SDWA, 2002*.

Protocol for Updating Cs of A for Waste Management

MOE notes that during the first phase of implementation this protocol will be applied to "environmentally significant waste management facilities that are associated with a higher risk of potential impacts on human health and the environment" including: hazardous waste disposal sites and incinerators, non-hazardous waste disposal sites and incinerators, hazardous waste processing and/or transfer sites, and non-hazardous waste disposal sites and/or transfer sites. MOE will also consider whether multiple Cs of A for a facility requiring amendment should be consolidated into a single C of A. If a new or expanded landfill site requires an environmental assessment, MOE will apply the applicable standards defined in O. Reg. 232/98 (Landfilling Sites) under the *Environmental Protection Act*.

Protocol for Updating Cs of A for Sewage Works

MOE notes that during the first phase of implementation this protocol will be applied to "environmentally significant facilities with direct effluent discharges to surface water or groundwater" including municipal or private facilities for the treatment and disposal of sewage, pumping stations and detention chambers that are designed and approved to overflow, and facilities for the treatment and disposal of industrial sewage, landfill leachate and ongoing site remediation activities. MOE will also consider whether multiple Cs of A for a facility requiring amendment should be consolidated into a single C of A.

Protocol for Updating Cs of A for Air Emissions

MOE notes that during the first phase of implementation of this protocol, owners of facilities will be encouraged to apply for a consolidated or a basic comprehensive C of A which MOE believes will enhance emitter accountability and compliance with regulations. A consolidated C of A may include new or previously unapproved sources of emissions and may also include all sources of contaminants from the facility or may be limited to sources that have common contaminants and are the subject of the review. The owner/operator cannot make operational modifications that require approval without amending its consolidated C of A. A basic comprehensive C of A differs from a consolidated C of A since it replaces all existing Cs of A for the facility and includes new or previously unapproved sources of emissions. It also allows the owner/operator to make operational modifications up to an approved Facility Production Limit without requiring an amendment to the basic comprehensive C of A. MOE notes in the protocol that basic comprehensive Cs of A are continually updated by the proponent and are its preferred approach.

Since October 1, 1998, an application for a C of A for Air Emissions must include an Emission Summary and Dispersion Modelling (ESDM) report which identifies all sources of common contaminants, even those that are not approved or not in the application. The ESDM report is used by MOE to assess compliance with Regulation 346, R.R.O. 1990 – General Air Pollution under the *EPA*. The protocol requires that basic comprehensive Cs of A include requirements to document ongoing compliance with performance limits in the facility's ESDM report and to make available to the public its summary of emissions.

Implications of the Decision

Based on MOE's contention that these protocols represent existing practices, their implementation should have had no impact on proponents or the public. Furthermore, it is the ECO's understanding that MOE has been using the protocols since 2002 to process amendments initiated by proponents or by MOE. However, when a number of updated Cs of A that had not been posted for notice and comment on the Environmental Registry were appealed, the ECO became concerned that MOE was making environmentally significant changes to Cs of A without first consulting the public as required by the *EBR*. After reviewing MOE's actions and the protocols, the ECO has concluded that the updates sampled by the ECO are environmentally significant. The ECO is concerned that proposals for some of the Cs of A updated as part of an MOE-initiated review were not posted on the Registry for notice and comment. For additional information on this review, please refer to pages 15-16 of the 2004/2005 annual report.

The protocols should improve the proponent's and the public's understanding of MOE's objectives and processes for updating Cs of A.

Public Participation & *EBR* Process

MOE posted the proposal on the Environmental Registry in May 2002, and received 13 comments during the 60-day comment period. It also hosted two stakeholder meetings in September 2002, during which MOE explained that the protocols reflect existing practices and do not introduce new policies. MOE also noted that the "Protocol for Updating Cs of A for Water Works" had been revised to reflect the enactment of the *Safe Drinking Water Act* in 2002 and O. Reg. 170/03.

In the decision notice, MOE summarized the comments and indicated how they were considered. MOE also indicated that it was in the process of developing standard terms and conditions for Cs of A. Five of the comments were related to MOE's position that it would encourage the use of consolidated and basic comprehensive Cs of A for Air Emissions. Commenters were concerned that replacing their existing Cs of A with either of these two types would be time-consuming and expensive for owners and would delay approval of routine Cs of A. In addition, some commenters believe that MOE should have consulted more broadly before it introduced these two types of Cs of A. In the decision notice, MOE indicated that approvals of these two types of Cs of A would not impede approval of routine Cs of A and owners would not be required to convert to either of these new types of Cs of A. In addition, MOE noted that it held information sessions on the basic comprehensive C of A in 2002.

Five commenters indicated that more information about MOE-initiated reviews of Cs of A should have been provided. In particular, some of them suggested that more details about the criteria MOE was using to target Cs of A for review should have been provided, and some of them requested that MOE provide a plan for the review. MOE did not respond to these comments in its decision notice.

ECO Comment

Although the ECO welcomes the publication of MOE's protocols for updating Cs of A, the ECO finds the protocols disappointing for several reasons. First, the ECO does not believe the protocols ensure that Cs of A reflect current environmental protection requirements. The protocols, according to MOE's own statements, document the same processes that were criticized by the ECO and the Auditor General and resulted in out-of-date Cs of A. The protocols do not indicate that MOE plans to review Cs of A on a periodic basis despite its statements to the Auditor General that Cs of A should have mandatory review dates. In case MOE had incorporated this requirement into the updated Cs of A, the ECO reviewed a selection of Cs of A that had been updated by MOE in the last couple of years using the protocols. The ECO found that none of the Cs of A, with the exception of a five-year expiry date on conditions in Basic Comprehensive Cs of A for Air Emissions, included a mandatory review date or an expiry date. The ECO believes that MOE should implement a legally binding process that requires it to periodically review Cs of A according to pre-defined criteria that may include level of environmental risk. The public and proponents should be advised of these reviews. Reliance on the proponent or on MOE abatement staff to trigger a review does not ensure that Cs of A reflect current environmental protection requirements.

Second, although three of the protocols refer to "this first phase of implementation," no information about future phases is provided. The ECO urges MOE to define its objectives and plans for future implementation phases.

Third, although the protocols indicate that MOE may initiate a review of a C of A at any time, the protocols don't clearly explain whether or not MOE will follow the processes defined in the protocols for Cs of A updated as a result of these reviews. The ECO urges MOE to confirm that the protocols, particularly the Registry consultation step, will be followed even if MOE initiates the review.

Fourth, the ECO believes that taking almost three years to post a decision notice regarding these protocols is unacceptable. With the exception of the drinking-water system protocol, the protocols documented existing procedures and were not particularly contentious. MOE advised the ECO that, since the draft water works protocol required updating after the *SDWA, 2002,* and related regulations were implemented, it delayed posting a decision to ensure that all four protocols were consistent and released together. The ECO would have preferred separate notices for each protocol so that proponents that don't require Cs of A for drinking-water systems would have benefited from access to the final versions of the other protocols. In addition, the ECO believes that, since the drinking-water systems protocol was substantially rewritten while it was still posted as a proposal, MOE should have provided the public with another opportunity to comment by reposting the protocol for notice and comment as intended by s. 13 of the *EBR.*

Finally, the ECO believes that the protocols are only a small step towards providing continuous improvement and consistency in the environmental protection conditions defined in Cs of A. The ECO does agree that the assessment criteria are a step forward. However, these criteria are generic in nature and provide no assistance to MOE staff when they draft the relevant conditions. The ECO is pleased that MOE is working on developing standard terms and conditions for the criteria and urges MOE to post them for public notice and comment. The ECO plans to continue to monitor the issues related to the management of Cs of A.

Review of Posted Decision:
Records of Site Condition (Ontario Regulation 153/04)

Decision Information:

Registry Number: RA03E0002	Comment Period: 60 days
Proposal Posted: February 28, 2003	Number of Comments: 459
Decision Posted: June 29, 2004	Came into Force: October 1, 2004

Description

The National Roundtable on the Environment and the Economy has defined brownfield sites as "abandoned, vacant, derelict or underutilized commercial or industrial properties where past actions have resulted in actual or perceived contamination and where there is an active potential for redevelopment." In November 2001 the Ontario government enacted the *Brownfield Statute Law Amendment Act (BSLAA)* and began a lengthy process to revise Ontario law and policy. The Records of Site Condition Regulation (O. Reg. 153/04) is the latest step in the province's efforts to facilitate the redevelopment of brownfield sites in Ontario. The province is encouraging brownfield redevelopment because it contributes to urban intensification, thereby curbing sprawl development and making maximum use of existing municipal infrastructure. The Records of Site Condition Regulation (RSCR) under the *Environmental Protection Act (EPA)* came into force on October 1, 2004, and sets out the detailed process and requirements for assessing contaminated sites, determining appropriate cleanup standards, and reporting on site cleanup. The RSCR is accompanied by an explanatory document entitled "Records of Site Condition: A Guide on Site Assessment, the Cleanup of Brownfield Sites and the Filing of Records of Site Condition" (October 2004).

The *BSLAA* amended the *Education Act*, *Environmental Protection Act* (*EPA*), *Municipal Act*, *Municipal Tax Sales Act*, *Ontario Water Resources Act* (*OWRA*), *Pesticides Act*, and the *Planning Act*. The overall aim of the *BSLAA* is to facilitate brownfields redevelopment by providing enhanced protection against environmental liability to those wanting to redevelop brownfield sites, and support for the financing of redevelopment of these sites including tax incentives via changes to the *Municipal Act*. The ECO reviewed the *BSLAA* in our 2001/2002 annual report (p. 83). In addition, the ECO reviewed the two existing brownfield regulations related to provisions in the *BSLAA* that apply to municipalities, secured creditors, receivers, trustees in bankruptcy and fiduciaries (O. Reg. 298/02 under the *EPA* and O. Reg. 299/02 under the *Ontario Water Resources Act* – as amended by the *BSLAA*) in the Supplement to our 2002/2003 annual report (p. 86). Among other things, these regulations serve to protect municipalities when they take control of sites and specify circumstances under which the Ministry of the Environment (MOE) can issue environmental orders and require owners or site controllers to provide notice to ensure that the ministry is made aware of any danger to the health or safety of any person (see p. 86 of the ECO annual report 2002/2003).

The RSCR as it is currently constituted, allows property owners to voluntarily file a record of site condition (RSC) on MOE's publicly accessible Brownfields Environmental Site Registry (BESR). Filing a RSC confers immunity from future MOE environmental orders relating to any historic contamination of a property. Immunity rights are suspended in some situations including: the identification of any new contamination problems on the site, any emergency situation caused by existing contaminants, the migration of existing site contamination to an adjacent property after the date of issue of a RSC, using the property for a more sensitive use than specified in the RSC, and the filing of a RSC containing false or misleading information. Filing of a RSC will become mandatory for changes in property use from industrial, community or commercial use to any of residential, institutional, parkland, or agricultural use as defined in the RSCR, as of October 1, 2005.

In order to file a RSC, a Phase I Environmental Site Assessment (ESA) must be completed to determine the likelihood that a site contains contaminants. A Phase II ESA, done to determine the concentration and location of any contaminants on site, must be completed to file a RSC if the property is currently or has ever been used for industrial activities and certain commercial activities (e.g., gas station, dry cleaner, bulk liquid dispensing facility). The RSCR does not include any requirement that a Phase I or Phase II ESA be reviewed and accepted by MOE. However, ESAs must be undertaken or overseen and certified by qualified persons (QPs) as defined in the RSCR.

If a Phase II ESA confirms that site remediation is necessary, there are two options available: clean up the property to meet the RSCR site condition standards or prepare a risk assessment (RA). A RA can be used in situations where it will be difficult for a particular property to meet site condition standards. Through the RA, proponents can pursue the development of property-specific standards, a process that involves assessing potential risks and setting site-specific, risk-based site condition standards. In addition, any necessary risk management measures must be identified. The RA must consider protection of both human health and the health of the natural environment. The first step in the RA is to submit a pre-submission form (PSF) to MOE. The PSF sets out a conceptual model of the proposed RA and details any required public communication plans. MOE reviews and provides the proponent with feedback on the PSF so that appropriate modifications can be made to the RA plan. Finally, the completed RA must be acceptable to MOE before a RSC can be filed. Remediation is done to the level required to allow the most sensitive use a proponent wishes to make of any part of the property.

An MOE Director appointed under the *EPA* also has the discretion to issue a Certificate of Property Use (CPU) for any property where a RA is undertaken and can thereby require certain actions or limit certain activities at that site. For instance, a CPU might impose certain site monitoring and reporting requirements or it may preclude certain construction activities like the erection of a building with a basement. The violation of any terms or conditions set out in a CPU eliminates any immunity from orders conferred through filing a RSC. The *EPA* requires registration on title of notice of a CPU. The Director must also give formal notice to municipalities regarding the issuance, alteration, or revocation of a CPU. The provisions within the RSCR requiring MOE to notify municipalities about the issuance of CPUs, and requiring a municipality's Chief Building Officer to refuse issuance of a building permit if a CPU restricts the building for which the permit is sought, come into force on October 1, 2005.

If a property does not meet the RSCR site condition standards or standards established and accepted via a RA process, then remedial work must be done to meet the standards established for that site. Additional remedial requirements or use restrictions might be imposed on a site for which a RA was done via the issuing of a CPU. Finally, the proponent must undertake confirmatory site sampling to verify that the site cleanup was successful.

The RSCR also sets out the required credentials and level of experience necessary for individuals to be recognized as QPs. Certain credentials are required in order for QPs to make certifications in ESAs and RAs. Specified credentials in combination with required years of experience are set out in order for QPs to be able to prepare or supervise RAs. The RSCR also requires that all QPs obtain appropriate liability insurance. This section of the RSCR will be revoked in October 2006, at which point MOE plans to implement a formal QP certification process and establish a registry of qualified QPs.

Qualifications for Those Making Certifications in ESAs or RAs:

Designation	Activity		
	Phase I ESA and Related RSC	Phase II ESA and Related RSC, no Risk Assessment	Phase II ESA and Related RSC, with Risk Assessment
Professional Engineer	X	X	X
Professional Geoscientist	X	X	X
Chartered Chemist	X	X	
Professional Agrologist	X	X	
Applied Science Technologist	X		
Certified Engineering Technologist	X		
Architectural Technologist	X		

*Above chart excerpted from "Records of Site Condition: A Guide on Site Assessment, the Cleanup of Brownfield Sites and the Filing of Records of Site Condition" (October 2004).

Qualifications & Required Years of Experience for Those Preparing or Supervising RAs:

Qualifications	Required Years of Experience*
4-year degree in science, engineering, or applied technology from post-secondary institution	8 years
Master's degree in science or engineering	7 years
Doctoral degree in science or engineering	5 years

* With at least two of those years in the field of risk assessment

Implications of the Decision

There are an estimated 3,900 brownfield sites in Ontario today although some experts believe there may be twice as many. From Ontario's earliest attempts to establish guidelines for brownfield redevelopment in 1989 to current efforts via the *BSLAA* and associated regulations, laws and policies to promote brownfield redevelopment continue to evolve. Three major elements of concern have emerged over the past 15+ years as provincial efforts continue to progress: liability, level of certainty, and accountability.

The *BSLAA* and associated regulations, including the RSCR, have been designed to contribute to this evolutionary progression by enshrining in legislation and associated regulations rules for brownfield redevelopment. The aim has been to address in a more substantive way, the various concerns that have emerged related to liability, certainty, and accountability.

Liability

Many experts and planners cite concerns around liability risks as creating the greatest barrier to brownfield redevelopment. The RSCR makes additional contributions to efforts to address liability risks by setting out detailed requirements for the preparation and filing of a RSC. Once filed on the BESR, the RSC confers certain immunities on property owners working to redevelop a brownfield site.

However, some *EBR* commenters believe the government has not gone far enough to reduce the liability barriers for those wanting to redevelop brownfield sites. They believe brownfields legislation should include immunity from any MOE orders associated with the migration of historical contamination off-site. It is worth noting that other North American jurisdictions have developed approaches to address this concern. For instance, the State of New Jersey recently announced an addition to its suite of brownfield regulations that protects a current landowner from liability associated with off-site migration of historical contamination if it can be demonstrated that the contamination does not pose a risk to human health or the environment. New Jersey has a strong track record, having redeveloped the most brownfield sites of any state in the United States, indicating that its continued efforts to facilitate this process are paying off.

However, it should be noted that, unlike Ontario, New Jersey's efforts are nested within a strong US federal government legal framework for promoting the re-use of contaminated lands.

Members of the legal community have also voiced strong concerns about the current lack of any protection for owners of brownfield sites from civil litigation claims for torts arising either on or off-site. These 'toxic torts,' as they are called, can emerge out of a variety of causal actions including: nuisance, strict liability, negligence, trespass, and riparian rights. Environmental lawyers with expertise in the legal aspects of contaminated site redevelopment argue that this potential liability continues to act as a serious deterrent to private sector involvement in brownfield projects.

Municipalities also worry that the RSCR does not provide them with adequate liability protection. More specifically, concerns have been raised about MOE's failure to include a statement in every RSC that public authorities can rely on the content of the RSC when issuing a building permit. Only RSCR implementation will demonstrate whether the MOE's decision not to include such a statement has any negative impact on brownfield redevelopment efforts.

Level of Certainty

Another element having a critical influence on efforts to facilitate brownfield redevelopment is level of certainty. For instance, investors have indicated that they want some level of assurance that a planned redevelopment will move through to completion within a reasonable timeframe. The RSCR contributes to the establishment of some level of certainty within the provincial environmental requirements for brownfield redevelopment by setting out turnaround times for ministry review and acceptance of any RAs required within the RSC process. This is an improvement over previous guidelines where response timeframes were completely absent.

Regardless of this, some point to s. 168.5 of the *EPA*, which indicates that the decision of the Director to accept or not accept a RA cannot be invalidated solely on the ground that the decision was not made in a time prescribed by the regulation. These commenters believe that this provides the ministry with a way to skirt the turnaround times set out in the RSCR. Others suggest that some required procedures in the RSCR lack established turnaround times that, if established, would further increase certainty levels. Others still suggest that the turnaround times established for RA reviews need to be much shorter than proposed.

Accountability

Finally, accountability has emerged as an important element in efforts to redevelop brownfield sites. The RSCR includes several components that serve to enhance a proponent's level of accountability to the broader public and to the environment when redeveloping a brownfield.

The regulation represents the first step toward the development of a system for formally certifying and registering professionals involved in making certifications in ESAs and RAs or in preparing or supervising the preparation of RAs. In contrast, guidelines in place prior to the RSCR did not set out any requirements for qualified persons and did not require that all QPs possess appropriate liability insurance.

The *BSLAA* incorporates the site condition standards found in the "Guidelines for Use at Contaminated Sites in Ontario," shifting them from guideline to enforceable standard status. This means that implementation of the RSCR will include application of these enforceable standards in the process of evaluating whether a property requires remedial work prior to redevelopment. The RSCR's CPU provision represents another legally enforceable tool that enhances accountability by providing MOE with the ability to restrict certain site uses and require certain actions to be taken at a brownfield site in order to protect the public and the environment.

Finally, the BESR also contributes to heightened accountability by enhancing the level of transparency regarding the state of brownfield sites. Members of the public can access filed RSCs via the BESR any time and at no cost. This is in contrast to the approach used in other Canadian jurisdictions. For instance, British Columbia has a site registry comparable to Ontario's BESR but the public must pay a fee to access information comparable to the information contained in a RSC prepared in Ontario. However, it should also be noted that RSCs are not posted to Ontario's BESR until late in the process, when brownfield site assessment and any remediation has already been completed.

Broader Implications of Act and Associated Regulations (Both Positive and Negative)
By contributing to on-going progress in efforts to facilitate brownfield redevelopment, the RSCR may contribute significantly to provincial efforts to encourage urban intensification and revitalization.

However, the RSCR decision also creates a potentially serious gap with respect to information communication and public consultation on brownfield redevelopment projects. The "Guidelines for Use at Contaminated Sites in Ontario," predecessor to the *BSLAA* and RSCR, offered some basic guidance regarding appropriate levels of public involvement in various brownfield redevelopment scenarios. The RSCR and associated MOE explanatory document ("Records of Site Condition: A Guide on Site Assessment, the Cleanup of Brownfield Sites and the Filing of Records of Site Condition, October 2004") lack any comparable detail regarding government expectations of the proponent where information provision and consultation are concerned. Only one mandatory requirement for communication and consultation is included in the RSCR – in the case of a wider area of abatement RA. Wider area of abatement RAs are done in cases where there are off-site impacts from the historical contamination on a site. In addition, if a site does not meet established site condition standards or the standards established via a RA, then remediation is required and, as part of site cleanup, the ministry suggests that "consideration should have to be given to the need for public information/communication."

Some critics have suggested that the *BSLAA* and RSCR provide a way around thorough remediation of contaminated brownfield sites by conferring immunity on landowners for past pollution problems. Instead, they believe that, whenever possible, past owners must be held accountable for site contamination problems. Further, they point to the need for a provincial or federal equivalent to the United States Superfund program in order to address severely contaminated sites.

It should be noted that MOE does have an Environmental Clean-up Fund (ECF) designed to address contamination problems in a number of specified circumstances:

- Provision of alternative water supplies where existing supplies are affected or threatened by a source of contamination;
- Cleanup of areas where environmental damage or health risks are identified;
- Hydrogeological studies of areas where serious contamination is known or expected; and
- Actions to remove or reduce potential long-term environmental hazards.

First called the Environmental Security Fund, this fund was established in 1985 with a starting balance of $100 million – and in 1989 it was reported that almost 100 cleanup projects were being funded with these dollars. The Director of MOE's Environmental Assessment and Approvals Branch is responsible for administering the fund. Unlike the U.S. Superfund, which is regularly topped up via a tax levied on the chemical and petroleum industries, the ECF is dependent on the infusion of provincial government dollars.

Other commenters believe the environmental policy challenge is to successfully balance this perspective with the desire and need to see brownfield sites redeveloped and, in so doing, to encourage urban revitalization and intensification thereby curbing sprawl development. When considering the challenge of severely contaminated sites, it also needs to be noted that the provision for mandatory RSCs, when it comes into force, will only apply to situations where a brownfield is going from a less to a more sensitive use. So, for instance, if a contaminated site continues to be used for industrial purposes, there is no requirement for a RSC to be filed. However, a property without a RSC on the BESR would not enjoy the immunities from potential MOE action that a RSC provides.

The coming into force of the RSCR has potential implications for the *EBR*. On June 22, 2005, MOE posted a notice to the Environmental Registry to amend O. Reg. 681/04 under the *Environmental Bill of Rights* to add certificates of property use as a Class II instrument.

Public Participation & *EBR* Process

The proposal for the RSCR and three draft technical documents were posted on the Environmental Registry for comment for 60 days. The posting included a link to a compendium document that provided more detailed descriptions of the components of the proposed regulation. During the comment period the ministry held a briefing session attended by over 100 stakeholders. A total of 459 submissions on the draft regulation were received via the Registry consultation process. The ministry has also indicated that it met informally with stakeholders in the six months preceding the posting of the decision notice. Commenters included: municipalities, business and industry representatives, professionals involved in undertaking ESAs and RAs, and non-governmental environmental organizations.

On June 29, 2004, MOE posted a decision notice on the Environmental Registry for the RSCR. The Ministry organized its responses to comments received into 7 categories of issues:

- Qualified Persons
- Record of Site Condition
- Mandatory Filing of a Record of Site Condition
- Site Condition Standards
- Analytical Procedures
- Risk Assessment and Environmental Site Assessments
- Environmental Site Registry

Qualified Persons

The greatest number of comments was received regarding the definition of QPs for the purpose of making certifications in ESAs and RAs, and for preparing or supervising RAs. Some applauded MOE's proposal to recognize a broad range of environmental professionals as QPs while others raised concerns about this change, indicating that only those with "professional designations provided through self-regulatory licensing bodies" (e.g., engineers (P. Eng.) or professional geoscientists (P. Geo.)) should be recognized as QPs. Still others raised concerns that the new system does not recognize the expertise of trained biologists, chemists, biochemists or environmental scientists, many of whom have years of experience with site remediation.

MOE responded by taking the following actions:

- Short-term establishment of required credentials to conduct Phase I & II ESAs, and required credentials and years of experience to conduct RAs (see charts below);
- Long-term commitment to develop and implement a system that will include regulated qualifications for QPs and a requirement that QPs register with MOE; and
- Requirement that QPs have professional liability insurance.

Record of Site Condition

Concerns were raised about the extent to which a municipality can rely on a RSC when making planning-related decisions for a given property. It was suggested that MOE include a statement in every RSC indicating that public authorities can rely on these documents, thereby protecting them from liabilities associated with RSCs. The ministry responded by stating that the RSC is "now based on legislated and regulated standards and content requirements which should increase the reliability of the record of site condition." However, MOE refused to modify the RSCs so that they would explicitly address the concern raised by municipalities. Further, the BESR contains a notice regarding due diligence "advising users of the Registry (BESR) who have dealings with any property to consider conducting their own due diligence with respect to the environmental condition of the property, in addition to reviewing information on the Registry (BESR)."

There were several noteworthy concerns not addressed by MOE. One non-governmental organization requested that any reports associated with a RSC be held by the property owner and/or QP for longer than the seven-year period set out in the RSCR as this information might well be of interest beyond a seven-year period. Another suggestion was made by a municipal planner that every RSC have an expiry date because, if a significant period of time passes between the filing of a RSC and the issuing of a building permit, the property could be subject to illegal dumping, recontamination, or tougher site standards, all of which would render the RSC out-of-date. Finally, several stakeholders recommended that MOE undertake periodic audits of submitted RSCs. This was the practice under the previous "Guidelines for Use at Contaminated Sites" but no audit requirements are specified under the new RSCR.

Certificate of Property Use (CPU)
Several requests were made for the ministry to include more detail in the RSCR regarding CPUs including when a CPU is required, and what kinds of requirements and conditions can be included in a CPU. The RSCR currently allows the issuance of a CPU at the Director's discretion. The MOE did not address this suggestion in its comments.

Mandatory Filing of a Record of Site Condition
Comments focused on inconsistencies between land use designations in the RSCR and the definitions used in the *Building Code Act*. MOE responded by modifying the RSCR definitions but indicated that modifications were constrained by the need to align definitions with prescribed clean-up standards. Concerns were also raised that the draft RSCR created situations where site remedial work required for filing a RSC might itself require a RSC. MOE responded by exempting certain remedial works such as excavation and shoring from RSC requirements. MOE also adopted a broader approach to defining property uses to address concerns about definitions of property use and corresponding changes requiring mandatory RSC filing. The RSCR states that a proponent must file a RSC for a change in property use from industrial / community/ commercial to any of residential, institutional, parkland, or agricultural use.

Site Condition Standards
Multiple requests were made for adoption of the Canadian Council of Ministers of the Environment (CCME) Canada-wide Standard (CWS) for total petroleum hydrocarbons (TPHs) as the site condition standard for TPHs. MOE implemented this change as well as updating site condition standards to include background standards for sediment and groundwater and a table to support improved procedures for applying site condition standards to shallow soil properties.

A noteworthy comment not addressed was a request that MOE follow up on a past promise to revisit and update the definition of inert fill in *EPA* Regulation 347, R.R.O. 1990 ("Regulation 347"). As noted by the commenter, the ministry had committed to update this definition as part of the process of developing new brownfields legislation. More detail is provided in the 'Other Information' section below.

Analytical Procedures
MOE clarified the section of the RSCR relating to accreditation of laboratories involved in testing soils from a brownfield site to confirm compliance with site condition standards. Accreditation must be in

compliance with the "ISO/IEC 17025 – General Requirements for the Competence of Testing and Calibration Laboratories." In addition, accreditation must be in accordance with the Standards Council of Canada standards for proficiency testing, if such standards exist for a parameter set out in the Soil, Groundwater and Sediment Standards. This latter requirement addressed requests that laboratory methods be accredited.

Risk Assessment & Environmental Site Assessments

Many concerns were expressed about the RSCR requirement that property owners go back only 10 years into the past to establish the current use at a brownfield site. The current use determines whether a Phase II ESA is required. Many felt the timeframe should be longer because some uses can cause contamination problems that persist for longer than 10 years (e.g., gas stations). In response MOE eliminated any reference to a timeframe in the RSCR, which now requires that a Phase II ESA be undertaken for property that is being used *or has ever been used* for industrial purposes or certain commercial uses. MOE also modified the section of the RSCR dealing with RAs by incorporating the technical template for the preparation of a RA directly into the regulation.

Some commenters suggested that municipalities should be notified as early in the RSC process as possible in order to help municipalities plan for the arrival of a building permit application for a brownfield site. In response, MOE indicated that the RSCR requires that a municipality be notified when a CPU is issued. However, CPUs are only issued for properties that underwent some level of remediation after an RA and are not necessarily issued for every such property.

Several noteworthy concerns were raised in comments but not addressed in MOE responses. Some commenters wanted to see additional commercial uses added to the list of those subject to a mandatory Phase II ESA. For instance, suggestions were made that any commercial operations potentially storing fuels and chemicals on-site, such as paint and solvent retailers, printing operations, laboratories, marinas, and lumber yards, should also be subject to a Phase II ESA. MOE did not respond to this suggestion nor did it expand the list of commercial uses subject to a mandatory Phase II ESA. One commenter recommended that MOE require a Phase II ESA where a property is located adjacent to a property used for industrial or high risk commercial activities, in order to address the possibility of migration of contaminants on-site from an adjacent property.

MOE also failed to address concerns raised about timelines for RA processes. Where specified in the RSCR, timelines were felt to be too long or without guarantee and, in the case of a PSF for a RA, concerns were raised about the lack of any timelines.

Environmental Site Registry

The BESR provisions were amended to allow the Director to post to the BESR any notices of orders or prosecutions relating to a property for which a RSC has been filed. The notices can then be removed when the conditions causing any orders or prosecutions are resolved.

The suggestion was also made that the RSC posted to the BESR include notice of the existence of a CPU and a copy of that CPU should be accessible on-line via the RSC. MOE did not provide any response to these suggestions.

The ECO contacted the ministry in December 2004 regarding the RSCR to determine the ministry's intentions regarding instruments issued under this regulation, including CPUs, and whether they would be prescribed under O. Reg. 681/94 (Classification of Proposals for Instruments) under the *EBR*. MOE responded in February 2005 that it was reviewing options for classifying certificates of property use for the purpose of the *EBR*. On June 22, 2005, MOE posted a notice to the Environmental Registry to amend

O. Reg. 681/04 under the *Environmental Bill of Rights* to add certificates of property use as a Class II instrument.

SEV

In its Statement of Environmental Values, MOE's first priority is the prevention of pollution and its second priority is the minimization of pollution that can damage the environment.

With respect to its SEV consideration in relation to this decision, MOE stated that the RSCR promotes environmental protection by facilitating the cleanup and the redevelopment of brownfield sites. Further, MOE explained that cleaning up brownfields improves our soil and water quality, protects human health, and revitalizes our communities. MOE also stated that the cleanup and redevelopment of contaminated sites is in keeping with an ecosystem approach.

Finally, MOE explained that the RSCR serves to promote resource conservation because it encourages the cleanup and redevelopment of contaminated land and this, in turn, will help to conserve Ontario's greenspace.

In sum, the ECO believes that the RSCR decision is consistent with the ministry's SEV and the purposes of the *EBR*.

Other Information

Revisiting the Definition of Inert Fill

For some time, MOE has indicated that it plans to revisit the definition of inert fill as set out in Regulation 347. As part of its 1996 "Responsive Environmental Protection" consultation document, MOE explained that the inert fill definition was "originally intended to allow clean soil, rock or like materials to be used as fill" but that "the definition did not envision the diversity of materials that could be safely used as fill." And so, in order to "provide clear directions and to preserve needed landfill capacity," MOE proposed "to introduce five categories of fill based on risk and acceptable uses." Further, the ministry indicated that "categories will be consistent with the Ministry's recently released Guideline for Use at Contaminated Sites in Ontario."

In August 1998, the ministry posted a proposal to amend the definition of inert fill and posted a document entitled "Criteria for the Management of Excess Soil" for comment. In its 1998 proposal, MOE proposed that four classes of inert fill should be established:

- Class I inert fill – based on rural parkland background values of soil in Ontario – may be placed anywhere without restrictions.
- Class II inert fill – based on the urban parkland background soil values in Ontario and may be deposited at receiving sites designated as residential land use.
- Class III & IV inert fills – based on the cleanup criteria, and placement of these classes of inert fill is determined by whether the receiving site is designated as either agricultural, commercial or industrial land use.

This proposal served to effectively broaden the definition of inert fill beyond the definition that is currently in place in Regulation 347: "'inert fill' means earth or rock fill or waste of a similar nature that contains no putrescible materials or soluble or decomposable chemical substances."

The benefit of broadening the definition of inert fill rests with the fact that inert fill, while designated as a waste, is exempted from Part V of the *EPA* and from Regulation 347. Therefore, fill designated as inert does not have to be disposed of in a waste facility approved under Part V of the *EPA*.

A total of 25 submissions were received in response to "Criteria for the Management of Excess Soil." But four years later, in August 2002, the ministry posted a decision indicating that it would not proceed with the proposal and, further, that a new Notice of Proposal for Regulation would be posted should any future proposal be made to amend the inert fill definition. In addition, the ministry made the following statement:

> The ministry is still interested in providing a clearer and more comprehensive definition of inert fill, however, any such amendments will be made in conjunction with the Brownfields Statute Law Amendment Act, 2001 and the soil quality and other regulations to be developed in support of that Act.

To date, MOE has not announced any formal plans within the context of brownfield legislation discussions to revisit the inert fill definition in Regulation 347.

ECO Comment

The public consultation process undertaken to solicit input on the Record of Site Condition Regulation (RSCR) was extensive and MOE did a reasonably good job of addressing many of the concerns that were raised. However, some of the significant concerns raised by commenters were not addressed in the RSCR or the Registry decision notice. Regardless of these shortcomings, the ECO believes that, overall, the RSCR represents another incremental contribution to on-going efforts to facilitate brownfield redevelopment in Ontario. The regulation enhances the level of certainty and accountability in the process and further reduces the liability burden on proponents involved in brownfield redevelopment projects.

Given that liability serves as a significant deterrent to brownfield redevelopment, any opportunities to reduce liability risks while continuing to protect the environment should be considered. However, the ECO remains concerned that the RSCR does not adequately address liability risk. The regulation fails to address the issue of current brownfield site owners facing liability risks associated with any off-site migration of historical contamination once a Record of Site Condition (RSC) is filed. Other jurisdictions in North America, such as New Jersey, have made strides in conferring immunity to developers under carefully specified circumstances and the ministry should examine these approaches to determine whether they could be adopted in Ontario. Further, the regulation fails to provide significant protection to brownfield owners from potential civil litigation claims for torts arising either on or off-site. MOE needs to consider how to minimize these liability risks as well if it is indeed committed to facilitating brownfield redevelopment.

The ECO is also concerned about the absence of biologists, biochemists and other environmental scientists from the list of professionals identified as qualified persons (QPs) for the purpose of completing or overseeing the completion of Phase I and II Environmental Site Assessments (ESAs). It is unclear why the RSCR fails to recognize these professionals as QPs, particularly since so many individuals with these qualifications have been involved in site remediation work in the province. Further, while it is desirable for professionals working on site remediation to possess statutory professional designations, the ECO hopes that MOE has not allowed this goal to supercede the goal of ensuring individuals with experience and qualifications are recognized as being qualified to undertake ESAs.

MOE's establishment of a publicly accessible Brownfields Environmental Site Registry (BESR) system is laudable. It is important that residents of Ontario have free access to the information on the state of redeveloped brownfield sites that is contained in a Record of Site Condition (RSC). Other jurisdictions have opted for registries that require the payment of a fee to access information while Ontario's system offers public access at no cost. The ECO believes the ministry should also post any Certificates of Property Use (CPUs) to the BESR so that the public is aware of any use restrictions or monitoring requirements at a given brownfield. In addition, a link should be established between the Environmental Registry created by the *EBR* and the MOE's BESR.

While positive steps have been taken to make RSCs accessible to the public, the process leading to this endpoint lacks any clear requirements for proponents to inform or consult with the broader public. The ECO believes it is critical that MOE develop comprehensive requirements for proponents to inform and involve the public in brownfield redevelopment initiatives in order to make the entire process transparent. The controversy that has emerged in the city of Orillia over the redevelopment of a brownfield site for the city's multi-use recreational facility underscores the importance of providing opportunities for interested members of the public to be informed of and become engaged in brownfield redevelopment projects from start to finish (see details on page 94 of the 2004/2005 annual report). Individuals with extensive experience in brownfield redevelopment have indicated that the most successful projects are those that effectively engage the public in all phases of these initiatives.

The ministry's failure to follow through on its 1998 commitment to revisit the definition of inert fill is also troubling to the ECO. The original intent of revisiting this definition was to broaden the definition to include fill that would otherwise be categorized as waste, even though it is clean enough to satisfy the site condition standards set out in the brownfields legislation. Further, by broadening the definition, the additional costs to the developer and the consumption of landfill space required to dispose of these soils as waste could be avoided. The ECO encourages the ministry to complete the *EBR* consultation process it initiated over seven years ago to update the definition of inert fill and, in so doing, to create yet another effective tool for the facilitation of brownfield redevelopment.

While the ECO has some significant concerns about the shortcomings of the RSCR, it is encouraging to see that some incremental progress is being made in efforts to create a regulatory environment more conducive to brownfield redevelopment. The RSCR is likely to contribute to provincial efforts to encourage urban intensification and revitalization. The ECO strongly encourages the province to continue to work towards developing effective tools to facilitate the re-use of brownfield sites in Ontario.

Review of Posted Decision: Amendments to the Water Taking and Transfer Regulation

Decision Information:

Registry Number: RA04E0011
Proposal Posted: June 19, 2004
Decision Posted: December 15, 2004
Comment Period: 60 days
Number of Comments: 58
Came into Force: January 1, 2005

Description

In December 2004, the Ministry of the Environment (MOE) issued a new Water Taking and Transfer Regulation (O. Reg. 387/04 under the *Ontario Water Resources Act*). This regulation governs the permit to take water (PTTW) program, under which MOE approves the taking of water by various large-volume water users. The new O. Reg. 387/04 (Water Taking and Transfer) replaces a 1999 regulation of the same name, O. Reg. 285/99, and repeals O. Reg. 434/03 which established a partial moratorium on PTTW issuance between December 18, 2003 and December 31, 2004.

Permits To Take Water

Under the *Ontario Water Resources Act* (*OWRA*), anyone taking more than 50,000 litres of water per day must obtain a permit from the MOE. This applies whether the source is surface water (e.g., from a river, lake or storage pond) or groundwater (e.g., from a well). Water uses that require a PTTW include: electricity generation; manufacturing and industrial uses; drinking water supply systems (municipal, industrial, commercial or private communal); de-watering for construction or aggregate extraction; agricultural irrigation; water storage for watering livestock and poultry; dams and reservoirs; and wildlife conservation projects such as wetlands creation. The *OWRA* provides exemptions for firefighting, for individual household use, and for direct watering of livestock and poultry. In addition, large private sector takings which were ongoing as of 1961 when the *OWRA* was amended to create the PTTW provisions are grandparented, and do not need a permit.

The stated purpose of the new regulation is unchanged from that of the 1999 regulation: "to provide for the conservation, protection and wise use and management of Ontario's waters." Both the new regulation and its predecessor cite the importance of water resources to the province's long-term environmental, social and economic well-being, and both require that the MOE Director, considering an application for a PTTW, take protection of the natural functions of the ecosystem into account.

O. Reg. 387/04 introduces many new elements to the PTTW program, and expands the scope of others:

Some industries' water takings are restricted: The regulation specifies certain industries that will not be allowed new or expanded water takings in watersheds that the ministry considers to be "high use." The industries singled out are:

- beverage manufacturing (including bottled water);
- fruit and vegetable canning and pickling (excluding water used only to wash the fruits and vegetables, not incorporated in the canned/pickled product);
- ready-mix concrete manufacturing (excluding portable mixers);
- aggregate processing where the final product is a slurry incorporating water; and
- other manufacturing or production that incorporates more than 50,000 litres/day of water into a final product (pulp and paper production and ethanol manufacturing are both excluded, as are all agricultural activities).

These are the industries that had already been singled out for a one-year moratorium on new or increased water takings, for parts of Ontario, announced by the ministry in December 2003 (the portable concrete mixing exemption came in June 2004, and is discussed on page 46 of this annual report Supplement). The one-year moratorium, lifted with the passing of O. Reg. 387/04 in December 2004, had applied to all of southern Ontario as well as those northern areas covered by conservation authorities. These industries had also been subjected to a regional moratorium on new PTTWs, between March 2003 and March 2004, in the Niagara Escarpment and Oak Ridges Moraine, under O. Reg. 153/03.

Designating areas as "high use": The regulation refers to two new maps created by the ministry, an "Average Annual Flow Map" and a "Summer Low Flow Map," which designate Ontario's watersheds as high, medium or low water use. No new or expanded water takings by certain industries are allowed in high use areas. For areas only considered to be high use during the summer period, new water takings may be permitted even for the industries listed above, but such permits must include a prohibition on taking water between August 1 and September 11. The regulation also requires the Director to consider water availability issues for all PTTWs, including, to the extent relevant to the particular case, whether a proposed taking is in a high or medium use area.

Water monitoring: Permit holders must monitor the amount of water taken daily, and report annually to the ministry. These requirements are phased in, starting with some classes of permit holders who must begin monitoring by July 1, 2005: the industries such as bottling, canning/pickling, ready-mix concrete, aggregate slurry and other manufacturing described above; municipal residential drinking water systems; and sectors regulated under the Municipal Industrial Strategy for Abatement (MISA) regulations, such as metal mining, electrical power generation, petroleum, and pulp and paper.

Protecting ecosystem functions: The 1999 regulation required the Director to consider the protection of the natural functions of the ecosystem, including interactions between surface water and groundwater. The new regulation goes further – ecosystem factors that must be considered, where information is available, include: natural variability of water flow or water levels, minimum stream flow, and habitat that depends on water flow or levels. Potential impacts on both quantity and quality of water are to be considered.

Sustainability and future uses: The 1999 regulation listed existing and planned uses of the water that could be considered when assessing an application, including livestock and other agricultural uses, municipal water supply and sewage disposal, private domestic uses and other matters the Director considers relevant. The 2004 regulation adds potential impacts on "water balance" and "sustainable aquifer yield," as well as consideration of "low water conditions" and whether the proposed taking is in a high use watershed. The terms "water balance," "sustainable aquifer yield" and "low water conditions" are not defined in either the regulation or the *OWRA*. The Director must also consider any planned municipal water uses approved under a municipal official plan or under the *Environmental Assessment Act*.

Removing the public interest test: The new regulation removes a provision in the 1999 regulation that allowed the Director to consider whether it is in the public interest to grant the permit.

Proposed uses and water conservation: Directors are now required to consider whether water conservation has been, or is proposed to be, implemented according to the best practices or standards available for the relevant sector. Another new consideration is the purpose for which the water is to be used. Finally, the regulation now requires the Director to consider whether the applicant is actually using the proposed quantity, or whether there is a reasonable prospect that they will use it in the near future.

Burden of proof: The regulation allows the Director to require the applicant to submit additional information related to the natural functions of the ecosystem, water availability, and proposed use of the water, such as plans, reports and other documents.

Notice and consultation: There are new provisions requiring the Director to notify municipalities and conservation authorities if a PTTW is applied for within their geographic boundaries. These notice and comment requirements augment the *EBR* requirements, and extend some consultation to instruments exempted from the *EBR* through use of the Class EA. However, no new appeal rights are created. Exceptions to the notice and consultation requirements apply if (a) the application is for a permit lasting less than one year or is solely for agricultural crop irrigation, (b) the delay would cause harm to people, the environment or property, or (c) the Director believes the municipalities and conservation authorities have already received the information. The Director may also require the applicant to notify or consult other interested parties, including governments of other jurisdictions, and to report back to the Director on efforts the applicant has made to resolve any concerns.

PTTW Guidelines and Procedures

In its regulation proposal notice in June 2004, the ministry indicated that it was undertaking an update of the PTTW program, including not only the Water Taking and Transfer Regulation but also the "Permit to Take Water Program, Guidelines and Procedures Manual (1999)" referenced in the 1999 Water Taking and Transfer Regulation. This manual is the policy that guides MOE staff in applying the regulation and the *OWRA* when reviewing PTTW applications. The manual received only minor administrative updates when the 1999 regulation was passed, and had remained substantially unchanged since 1984.

The Registry proposal for the new regulation specified that a draft of the new manual would also be posted for consultation, before the regulation was finalised. However, the ministry did not post a draft "Permit To Take Water Manual" for consultation until December 14, 2005, the day when the decision was posted on O. Reg. 387/04. A decision notice on the new manual was issued in April 2005, and the manual will be reviewed in the ECO's 2005/2006 annual report. The ministry also updated its 1994 "Guide for Applying for Approval of Permit to Take Water." The new "Guide to Permit To Take Water Application Form" was released in April 2005. It is not referred to in the Registry decision notices for either the new regulation or the new PTTW manual.

Water Transfer and the Great Lakes

As well as water takings, O. Reg. 387/04 also deals with "water transfer" or movement of water out of watersheds. These provisions are largely unchanged from the 1999 regulation: water may not be transferred out of any of the three major water basins in the province, including the Great Lakes basin, and a Director considering a PTTW application must ensure that Ontario meets its Great Lakes Charter obligations. For an update on the Great Lakes Charter, a water management agreement between Ontario, Quebec and the eight Great Lakes states, see pages 64-66 of the 2004/2005 annual report.

Implications of the Decision

Collecting Water Use Data

Over the past several years, the government has launched numerous initiatives aimed at improving the province's understanding of its water resources, including the Provincial Groundwater Monitoring Network led by MOE, and the Water Resources Information Project led by MNR. The 2004 Water Taking and Transfer Regulation will begin to allow MOE to systematically collect information not only on what water takings it has permitted, but on actual quantities of water taken.

Hierarchy of Water Uses

Ontario is a relatively water-rich part of the world, but Ontario residents and businesses are also among the highest per-capita consumers of water. The province has seen several incidents where water takings have interfered with neighbours' water uses, or even dried up a stream. A growing population and growing industries, compounded by the impacts of climate change, could mean more water shortages. Of all the types of instruments prescribed under the *EBR*, Registry proposals for PTTWs draw the most comment and controversy over possible impacts to the environment and to other water users.

Water takings in Ontario are subject to a complex framework of statutory law, common law and government policy, and no clear hierarchy exists to prioritise some water users over others in situations of scarcity. Section 34 of the *OWRA* exempts firefighting emergencies, water takings for individual house and garden use, and direct watering of livestock or poultry from the requirement to obtain a permit, in deference to historical common-law provisions related to 'riparian rights' or the rights of property owners to use water on their property. In contrast, the Ontario Low Water Response, the province's drought preparedness program developed in 1999-2000 after a few years of drought problems, classifies as "essential" or priority those uses directly related to human health, such as drinking water and sanitation and fire protection, as well as water for basic ecological functions. Agricultural uses are categorised alongside industrial and commercial uses as "important" but not "essential," while many household uses, such as swimming pools, lawn watering and car washing, are categorised as non-essential. However, the province recently gave agriculture special fee-exempt status in terms of the new fees being charged for PTTW applications (see "Other Information: New Permit Fees," below).

While the 2004 Water Taking and Transfer regulation requires the Director to take into account the purpose for which the water is to be used, the regulation does not spell out which purposes are to be prioritised over others. The 1999 regulation included a provision allowing the Director to consider whether it would be in the public interest to grant the water taking. This has been removed from the list of factors for consideration in the 2004 regulation. It is not clear what the environmental implications of this change will be, or whether it will result in some water uses being constrained or promoted.

The regulation does, in its section on high use watersheds, indicate that lower priority will be given to five types of water uses (beverage manufacturing, fruit and vegetable canning, ready-mix concrete, aggregate slurry, and many other water-incorporating manufacturing or production activities) than to other users. However, priority among the remaining water users is not addressed. When considering whether to approve or amend a PTTW, the Director is required to take into account ecosystem functions, and existing municipal residential drinking water systems, private domestic use, sewage disposal, livestock and other agricultural purposes. Planned municipal water uses are to be considered, whereas other planned water uses, for agriculture, private domestic or other purposes, have been removed from the list of considerations.

Protecting Water in High-Use Watersheds

One of MOE's claims about the new regulation was that "new or expanded takings that would remove water from watersheds that already have a high level of use will no longer be allowed." However, the regulation in fact targets only specific activities (beverage manufacturing, fruit canning, etc.), while specifically exempting some high-consumption activities such as growing crops, and producing pulp and paper.

While the draft regulation sets out a number of factors that the MOE Director must consider in determining whether the PTTW program should regard a watershed as "high use" and should refuse certain types of PTTW applications, the final text of O. Reg. 387/04 removes this list of factors, and instead provides maps. The maps provide greater certainty for potential water users, but neither the maps nor the regulation indicate what technical criteria were used to produce this water use designation scheme.

Ecosystem Impacts and the New Guidance Manual

The new regulation provides greater specificity in terms of ecosystem functions to take into account, but only requires that these factors be considered to the extent that information is available. It gives ministry staff the power to require the applicant to submit additional information on potential ecosystem impacts (when staff are reviewing new or renewed PTTWs, not when considering whether to cancel, amend or impose conditions on an existing permit).

How the ministry chooses to interpret and implement the Water Taking and Transfer Regulation will therefore be the key factor determining its effectiveness in safeguarding ecosystems from excessive water extraction. For example, consideration by the Director of ecosystem impacts will depend on how such impacts are defined by the ministry, on the amount, type and quality of information that applicants will be required to submit to support a PTTW application, and on the ministry's allocation of technical capacity to review the applications. MOE currently possesses little ecological expertise. The fact that certain large operations are grandparented may also complicate MOE efforts to analyse the cumulative effects of water takings.

Public Participation & *EBR* Process

Prior Consultations

MOE carried out several rounds of consultation on the Water Taking and Transfer Regulation. Most of the substantive changes introduced in the 2004 proposal were contained in a prior proposal posted to the Environmental Registry in April 2003. When it posted the 2003 proposal, MOE issued a news release indicating that it was responding to calls from the Association of Municipalities of Ontario, the ECO, the Environmental Review Tribunal and some conservation authorities to improve the PTTW program. The 30-day consultation period for this proposal ended in May 2003, and no decision or update has since been posted.

MOE also consulted on proposed changes to the PTTW program through its "White Paper on Watershed-based Source Protection Planning," released in February 2004. Two advisory groups on source protection, formed in November 2003, were also asked to provide recommendations on the PTTW program. In their November 2004 reports to the minister, these committees commented on the June 2004 draft Water Taking and Transfer Regulation. They emphasized the importance of integrating the PTTW program with source protection. They recommended that MOE should, among other things: only approve PTTWs that are consistent with source protection plans; require water use and return flows to be tracked; provide data on water takings to the public and to source protection committees; promote conservation and prioritise among competing uses; end the *OWRA* exemptions for certain types of takings; improve the science for assessing sustainability of takings and protecting ecosystems; and consider quantity of water to be consumed, impacts on water quality, and societal benefits of PTTW applications.

Comments on the June 2004 Proposal

In June 2004, the ministry posted the proposal notice that provided the basis for O. Reg. 387/04. The notice stated that the ministry had met with key stakeholders to consult on the PTTW program from February to April 2004.

Fifty-eight commenters responded. Many expressed their support for increased guidance on the aspects of ecosystem function and use of water which the Director is to consider, enhanced notification of municipalities and conservation authorities, and mandatory monitoring and reporting of actual use of water.

Some comments focused on promoting the interests of particular sectors such as agriculture, electricity generation, mining, golf courses and water bottling. Many others presented ideas to strengthen environmental protections (except where noted, the ministry did not indicate how these comments were taken into account in its decision):

- *Aquifer sustainability and water balance:* Several commenters suggested stronger protection of aquifers and their ecosystem functions. In response to comments about the draft regulation's use of the terms "sustainable aquifer yield" and "water balance," the ministry removed the definitions of these terms but continued to use these phrases in the final regulation.
- *Conservation:* The draft regulation required a Director to consider whether water conservation is to be implemented in accordance with "sectoral standards," and many commenters asked that this be clarified. In its decision, the ministry replaced the term "sectoral standards" with the phrase "best water management standards and practices for the relevant sector if these are available."
- *Ecosystem protection:* Commenters asked for a definition of "ecosystem" and for clarification of what the minister will do when a PTTW would negatively affect an ecosystem. Other suggestions included consideration of cumulative effects on a watershed, and attention to water quality as well as quantity.
- *Fees:* Fees were widely discussed in comments, including the suggestion that fees options be posted to the Environmental Registry for public consultation. Others suggested structuring fees to encourage water conservation, and directing fees towards water protection activities. The ministry's decision on fees is discussed below.
- *Grandparenting:* Many commenters called for the new standards to apply to existing water takings. Among the concerns with existing water takings: takings which began before 1961, when the *OWRA*'s PTTW provisions were introduced, are exempted from the regulation; and many existing PTTWs have no expiry date.
- *Great Lakes:* The most frequent comment was a request that the ban on transferring water out of the Great Lakes basin, first passed in 1999, be extended to also cover bottled water. Another suggestion was revising the regulation's definition of water basins to match that of the Great Lakes Charter, in order to limit water transfer between Great Lakes.
- *High use watersheds:* As well as questioning which watersheds would be defined as high use, comments included the need to set priorities for water allocation, and to clarify how the PTTW program fits with the MNR-led Ontario Low Water Response program (for a review, see the ECO 2001/2002 annual report Supplement, pp. 143-8).
- *MOE oversight:* Many comments called for improved MOE enforcement, suggested technical training for MOE staff, and asked for faster permit processing.
- *Notice and consultation:* Suggestions included: strengthening municipal and conservation authority roles; requiring consultation with neighbouring municipalities, source protection boards, local services boards, First Nations, and neighbouring land owners; enhanced public consultation for large or environmentally sensitive proposals; and removing the notification exemption for agricultural and short-term permits.
- *Requirement to have a permit:* Many suggested lowering the 50,000 litres/day threshold for PTTWs.
- *Source protection:* Commenters suggested that MOE ensure the PTTW program is coordinated with the proposed source protection program.
- *Guidelines needed:* Many commenters called for all technical standards and guidance (e.g., or ecosystem impacts, assessment methods, analysis tools, consultation methods) to be publicly reviewed along with the proposed changes to the regulation. MOE did revise its PTTW Manual, but consultation on this occurred after the decision on the new regulation was already made.

Response to Comments

MOE's decision notice explained that in response to comments asking for clarification on how high use watersheds would be identified, this section had been amended, by referencing two new maps that were not part of the June 2004 proposal.

MOE asserted that exemptions to the high use watershed section of the regulation, added in the final version of the regulation, were in response to comments requesting clarification. The new exemptions are for aggregate extraction where the water taking is "incidental," for pulp and paper manufacturing, and for ethanol production. The final regulation also clarifies that the high use watershed provisions don't apply for water taken from the Great Lakes, their connecting channels, and other large waterways such as the St. Lawrence and Ottawa Rivers.

In response to questions about why the water use monitoring and reporting requirements were only applied to some water users, not all sectors, the ministry introduced provisions to phase in the requirements so that all PTTW instrument holders will be required to monitor by 2007, and to report data to MOE by 2008.

MOE's decision notice did not explain whether it had considered or responded to many other comments submitted in response to the proposal.

SEV

The ministry provided a very cursory statement of how its SEV was considered in this decision, citing positive impacts of the decision on environmental protection, the ecosystem approach, and resource conservation.

Other Information

New Permit Fees

Although not mentioned in the policy proposal and decision notices on the Environmental Registry, another change to the PTTW program has been the introduction of a fee for permit applicantions. The concept of charging a fee to PTTW applicants was raised in an MOE press release of April 21, 2003, and in the 2003 Registry proposal notice outlining changes to the Water Taking and Transfer Regulation. The proposal to charge fees was also addressed in the government's "White Paper on Watershed-based Source Protection Planning" released on February 12, 2004, and was discussed in consultations on source protection held by MOE at locations around Ontario in March 2004. The proposed structure of such fees was not announced in these statements or consultations.

On December 23, 2004, the ministry announced that applicants for new PTTWs would be charged an administrative fee: $750 for the more straightforward applications, and $3000 for cases in which MOE will have to review more detailed technical information. The fee started to apply as of April 1, 2005. An information notice on the Environmental Registry indicated that for permit applications already submitted prior to April 1, MOE intended to process these applications faster if the applicant chose to resubmit the application and pay the new fee.

Then on March 8, 2005, shortly after an Ontario Federation of Agriculture rally at Queen's Park and shortly before a smaller rally by other more activist farmers against provincial regulations affecting their sector, the ministry announced that farmers would be exempted from these fees.

ECO Comment

The ECO has been among many voices calling for an overhaul of the PTTW program (e.g., see the ECO's July 2000 special report to the Legislative Assembly of Ontario: "The Protection of Ontario's Groundwater and Intensive Farming"). In a 2001 brief to the Walkerton Inquiry, "Ontario's Permit to Take Water Program and the Protection of Ontario's Water Resources," the ECO pointed out a number of weaknesses in the program:

- PTTW proposals on the Environmental Registry were often incomplete, inaccurate and misleading.
- The ministry did not subject most municipal water takings, along with irrigation takings and takings of less than one year in duration, to the public consultation and leave to appeal provisions of the *EBR*.

- PTTWs were inconsistent in their units of measurement, and the ministry tracked only quantities permitted, not quantities actually taken.
- The threshold of 50,000 litres/day excluded many significant water takings, and information was needed both on agricultural takings not subject to PTTW requirements, and on domestic water wells.
- MOE staff did not appear to be implementing the ecosystem protection provisions of the 1999 regulation, since they lacked accurate data on existing takings and were using a PTTW guidance manual that had not been substantively updated since 1984.

The ECO has also witnessed a remarkable evolution of the PTTW process. Both proposal and decision notices, and the permits themselves, have generally improved over the 1995-2005 period. However, room for significant improvements remains. The ECO therefore commends the ministry for introducing some much-needed changes with O. Reg. 387/04, after extensive public consultation. Most notable is the requirement for permit holders to monitor and report on quantities of water taken. This has the potential to be a very important step forward for water data management and for water protection in Ontario.

The ECO urges the ministry not only to receive reports on water takings, but to actively manage these data so that they are readily available and useful. Accurate data on water takings have the potential to improve MOE decisions on future PTTW applications, and to support other provincial initiatives such as source protection, Ontario Low Water Response, Great Lakes protection, state-of-the-resource reporting, and ongoing water policy development. The Ontario government has a legal and moral obligation, as steward of this significant new source of water information, to make the data readily available not only for its own programs but for the broader water protection community including conservation authorities, municipalities, the public and other ministries. To do so, MOE must provide quality control auditing of reported volumes of water used, maintain an up-to-date electronic database, and ensure accurate GIS locations for all water takings. Another crucial step will be linking PTTW data with other GIS-based information sets related to water levels and flows, water quality, and land use, for example through the province's Water Resources Information Project in partnership with MNR.

The ECO also commends the ministry for beginning to clarify the regulation's ecosystem protection provisions, for enshrining water conservation as a value in the regulation, and for adding new public consultation provisions.

Many issues require further clarification, including: how and when applicants will be required to conduct consultations with people who have an interest in the proposed water taking; the extent to which applicants will be responsible for providing information on ecosystem function, water availability and water use considerations, and on the interests of other parties; and the water conservation standards that will be applied to each type of proposed water taking. The new PTTW Manual was released in July 2005, and the extent to which it addresses such key questions will be reviewed by the ECO in reporting year 2005/2006. The ECO also urges MOE to update its 2003 proposal notice to indicate that a new initiative was proposed and a decision made in 2004.

MOE added valuable clarification by providing maps with the final regulation, delineating the high and medium use watersheds. But the ministry did not provide information on what technical (or other) criteria were used to make these determinations. The ECO encourages the ministry to clarify what criteria apply for making these watershed categorisations, to indicate when and how these maps will be updated, and to commit to allowing for full public consultation on future watershed use designation determinations.

The Water Taking and Transfer Regulation requires consideration of the purposes for which water is to be used. However, it does not provide a clear framework for prioritising some water takers over others, with the exception of a limited suite of industries such as juice manufacturing and fruit canning. While the ministry has described these as "consumptive uses," this is a questionable claim since the list clearly excludes many high-consumption activities. It is not clear whether existing private-sector uses would trump planned municipal uses, especially given the ministry's decision to remove the public interest consideration from the list of factors to consider. The ECO encourages MOE, in consultation with other ministries and stakeholders, to develop a clear hierarchy of types of water takings, to facilitate water use conflict resolution, while maintaining the protection of natural ecosystem functions as the primary consideration. Such a framework will be essential as MOE moves forward on new legislation related to source water protection and watershed management.

Finally, the ECO continues to encourage MOE to develop water budget methods to account for all significant water takings including agricultural and private domestic uses, to allow water management decisions in Ontario to be based on more robust and complete information.

Review of Posted Decision:
Aggregate Extraction on the North Shore of Lake Superior

Decision Information:

Registry Number: RA04E0001
Proposal Posted: April 2, 2004
Decision Posted: December 9, 2004
Comment Period: 30 days
Number of Comments: 5,734
Decision Made: December 2004

Description

In April 2004, the Ministry of the Environment (MOE) posted a notice on the Environmental Registry (RA04E0001) in which it proposed to designate, by regulation, a proposed trap rock quarry operation under the *Environmental Assessment Act (EAA)*. Superior Aggregates, a subsidiary of an American contracting and road-building firm, planned to establish the quarry on the north shore of Lake Superior, in Michipicoten Harbour near Wawa. Michipicoten Harbour is situated on a 2,900 km stretch of shoreline which, in 1999, was designated the "Great Lakes Heritage Coast" (GLHC). (For further information refer to "*Great Lakes Heritage Coast*" under "Other Information" below.) At the time, the Township of Michipicoten was not designated territory under the *Aggregate Resources Act (ARA)*, and therefore not subject to its rules, including requirements for site plans, compliance reporting and rehabilitation.

In late 1999, Superior Aggregates had purchased 386 hectares of land along a 2.5-kilometre stretch of the Lake Superior shoreline. The company planned to establish its first, five-year phase of operation on approximately 12 hectares, a small part of which was used as harbour lands prior to 1998. Until 1998, when the inland Algoma ore mine closed, the harbour was used to ship iron ore and as a receiving point for various industrial supplies and goods. Superior Aggregates announced its plans to drill, blast, crush and wash various aggregate products on site before transporting them across Lake Superior to markets in the U.S. and Ontario for use primarily in road construction. Superior Aggregates has publicly expressed its intention to extract aggregate at the site over the long-term.

MOE's proposal notice explained that the proposal to designate the planned quarry operation under the *EAA* was prompted by a high degree of public interest and concern – the ministry had received over 100 requests urging it to either designate or not designate the operation. The purpose of the notice was to solicit additional input on whether or not the ministry should designate the operation under the *EAA* and, if so, on what provisions of the Act should apply.

Several months before MOE posted its notice on the Environmental Registry, the Township of Michipicoten began a rezoning process for the proposed quarry site. (For further information see "*Municipal land rezoning*" under "Other Information.") In November 2003, the township adopted an official plan amendment and an implementing zoning by-law to rezone 35 hectares of Superior Aggregates' shoreline property. The land designation was changed from a mix of rural and industrial to "Michipicoten Harbour Special Policy Area." Permissible land uses in the rezoned area were to include the quarrying of aggregate and accessory uses; manufacturing, processing, storing and loading of goods and materials; warehousing; forestry operations and accessory uses; and a marina. A local residents group appealed the zoning by-law to the Ontario Municipal Board (OMB). The township forwarded the official plan amendment to the Ministry of Municipal Affairs and Housing (MAH) for approval and in January 2004, the ministry posted an instrument proposal notice for the amendment on the Environmental Registry (IF04E7002).

In August 2004, four months after MOE proposed to designate the proposed operation under the *EAA*, the Ministry of Natural Resources (MNR) posted an emergency exception notice on the Registry (RB04E6011). The notice informed the public that parts of the Territorial District of Algoma, including the Township of Michipicoten and the entire 386-hectare property owned by Superior Aggregates, had been designated under the *ARA*.

All aggregate pit and quarry operations in Ontario – in both *ARA* and non-*ARA* designated territory – must abide by the noise and pollution requirements set out in the *Environmental Protection Act*, apply for permits under the *Ontario Water Resources Act* (e.g., permits to take water) if necessary, and ensure proper zoning of the site as per the *Planning Act*. However, only those aggregate operations on Crown land and designated private lands in Ontario are legally required to follow the requirements of the *ARA*. Private land is made subject to the *ARA* through a designating regulation, issued by the MNR, under s. 5(2) of the Act. The *ARA* and O. Reg. 244/97, the general regulation under the *ARA*, outline requirements for the establishment, operation and closure of aggregate pits and quarries in the province. Standards for aspects such as site plans, public notification and consultation, and operations for various categories of licences and permits, are spelled out in MNR's "Aggregate Resources of Ontario, Provincial Standards," introduced in 1997. While most private land in southern Ontario is designated under the Act, most private land in northern Ontario, including some significant aggregate resource areas, is not. The approvals process for aggregate operations on private lands not designated under the *ARA* is overseen by municipalities.

In December 2004, MOE announced it had decided *not* to designate the proposed quarry under the *EAA* and updated its April 2004 notice to reflect that decision (RA04E0001). MOE explained that it believed that the concerns expressed could be addressed in alternative ways, specifically through instruments required under four other Acts: the *Planning Act*, the *EPA*, the *OWRA* and the *ARA*. According to MOE, the *ARA* constitutes "the best legislative tool to apply to new quarry operations in Ontario."

One week later, MNR proposed to issue Superior Aggregates a Class A licence under s. 7(2)(a) of the *ARA*, posting an instrument proposal notice on the Environmental Registry with a 44-day comment period (IB04E2006). Class A licences allow for the removal of more than 20,000 tonnes of aggregate annually from a quarry. The notice indicated that the applicant requested an unlimited annual tonnage. As the application is for a licence for a pit and quarry operation which is restricted to extract aggregate material no closer than two metres above the ground water table, Category 4 application standards, as outlined in MNR's "Aggregate Resources of Ontario, Provincial Standards," apply.

As of August 2005, MAH's instrument notice (IF04E7002) and MNR's instrument notice (IB04E2006) stood as proposals on the Registry.

Implications of the Decision

The implications of MOE's decision not to designate the proposed quarry under the *EAA* must be considered in the context of MNR's decision of August 2004 to make the Township of Michipicoten and surrounding areas subject to the *ARA*.

MOE provided a regulatory impact statement (RIS) in its April 2004 proposal notice (RA04E0001). The RIS stated that subjecting the proposed quarry operation to the *EAA* would "ensure that appropriate environmental protection measures are assessed with respect to the construction and operation of the proposed quarry and that interested persons are consulted." As the proposed operation was not subject to the *ARA* at the time, its designation under the *EAA* would have filled an important regulatory void and ensured proper consideration of the environment and public involvement in the decision-making.

MNR also provided a RIS in its August 2004 emergency exception notice which informed the public that the *ARA* now applied in the Township of Michipicoten and surrounding townships (RB04E6011). The RIS stated that the environmental and social impacts of the proposed regulation would be positive, while the economic impacts would be positive to neutral. The ministry noted that the *ARA* sets out rules for the establishment, management and eventual closure of quarries and pits on Crown land and in designated private land in Ontario and that it also "requires progressive and final rehabilitation of land where aggregates have been extracted."

MNR's notice also explained that the *ARA*-designating regulation would have positive social impacts, as it requires public notice and consultation on new operations. In addition, the *ARA*'s site plan requirements call for the use of features such as berms, setbacks and tree screens to minimize undesirable appearances and to protect natural features. MNR stated that the proposed regulation would have a positive economic impact on the municipalities in the newly designated areas who would henceforth receive a portion of the licence fee. The decision would also create a "level playing field" for aggregate operators in Ontario as operators in designated areas incur *ARA* licence fees and greater costs as a result of meeting the requirements of the Act.

The ECO concurs with MNR that the *ARA* offers protections that are not available in non-*ARA* designated areas and that the decision to make the Township of Michipicoten and surrounding areas subject to the *ARA* was a positive one. In fact, the ECO believes that the move to subject these and other non-designated areas with extraction potential should have been made years ago (see "*Designation of significant resource areas of Ontario under the ARA*" under "Other Information" below).

The ECO also agrees with MOE's statement, made in its December 2004 decision notice (RA04E0001) that the legislation in place – the *ARA*, the *Planning Act*, the *EPA* and the *OWRA* – "have the scope to address the key environmental concerns and the public interest." In theory, the *ARA* provides a comprehensive framework for the consideration of the environmental and social impacts of an aggregate operation throughout its lifecycle. Section 12 of the Act states, in considering whether a licence should be issued or refused, that the Minister of Natural Resources or the OMB, as the case may be, shall have regard to a number of factors, such as any possible effects of the operation on nearby communities, on the environment and on ground and surface water. Among other things, applicants for Category 4 licences must submit a report which inventories the significant natural features of the area, including fish habitat and significant portions of the habitat of endangered or threatened species and, if identified, requires applicants to assess negative impacts and propose preventative or mitigative measures. Measures to mitigate dust and a spills contingency program are among the operational requirements of a Category 4 approved operation.

Moreover, under s. 7(5) of the Act, the minister has considerable discretion to require applicants to supply any additional information and can withhold a decision until such information has been provided. Section 12(k) allows the minister or the OMB to consider any other matters as are considered appropriate. The *ARA* also requires public notification and consultation for new operations and provides for ministry inspection and compliance enforcement.

Public Participation & *EBR* Process

MOE's proposal to designate the operation under the EAA (RA04E0001)

MOE received 5,734 submissions in response to its Registry notice proposing to designate the proposed aggregate operation under the *EAA*. In total, 4,671 sets of comments, including 4,329 identical form letters, expressed support for MOE's proposal. Among those in support were members of non-governmental organizations, tourist operators, academics and local residents. While a number of organizations registered their opposition to the proposal through fairly detailed submissions, most of the 1,000 plus submissions which opposed designation comprised a form letter. The Registry notice also indicates that Superior Aggregates held two public information sessions – on July 11, 2002 and February 26, 2003 – on the proposed project.

Comments supporting EAA designation

Those in support of MOE's designation proposal discussed a range of environmental, social and economic issues relating to the proposed aggregate operation. Environmental concerns included possible impacts on air, soil and water, both surface and ground. A number of commenters stated that it is likely that sulphur, arsenic and other metals are present in the aggregate on the site and remarked on the possibility of acid mine drainage resulting in contamination of soil and Lake Superior. One commenter stated that arsenic has been found in wells on the Michipicoten First Nations reserve, located only one kilometre from the proposed site.

The atmospheric release and subsequent deposition of contaminants on local and transboundary lakes and lands was also discussed, as was the possibility of oil spills, high noise levels of the operation and the introduction of invasive species through lake freighter transport. Some commenters further expressed concerns about the adequacy of the company's studies done to date on some of these impacts.

Commenters described expected impacts of the aggregate operation on surrounding ecosystems and wildlife, some arguing that the operation would cause irreparable damage to the delicate ecological integrity of the bay and surrounding aquatic habitats. One commenter discussed new research which he believes reveals that coastal Lake Superior constitutes a very diverse and globally unique ecosystem (an "inland coastal rainforest") and argued that additional time is needed to better understand the ecology of the region and to initiate conservation measures.

Concerns were expressed about the fate of local wildlife, especially that of threatened and endangered species. Numerous commenters stated that fragmentation of the natural shoreline would further compromise the future of populations of local woodland caribou, a threatened species according to the Committee on the Status of Endangered Wildlife in Canada. Commenters registered concerns about disturbances to trout spawning areas and other critical fish habitat located near the proposed quarry site through silting, noise and contamination.

The potential of the operation to contaminate the drinking water supply of residents, most of whom obtain their drinking water from minimally-filtered wells, was among the human health and social impacts anticipated by commenters. Local residents also stated that the noise and pollution would prevent them from being able to enjoy their property and to have enjoyable recreational experiences in the area. Residents also expressed concern about the aesthetic impact of the project and the loss of cultural heritage, noting that Michipicoten Bay is one of the most archeologically and historically significant areas on the entire coast.

On the economic front, one organization challenged Superior Aggregate's estimation that its operation would create 15-18 jobs for the Wawa community. The organization argued that, based on experience with other trap rock quarries in the region, the operation would likely only provide three to six seasonal jobs. The operation would also be subject to market demand and therefore could be shut down for periods of time. Another commenter stated that, if approved, Superior Aggregate's operation would cause another quarry in northern Ontario to close.

A number of local tourism companies and tourists expressed concern that the operation would cause the loss of a "world-class nature experience." Many remarked that the planned operation pits development of the resource industry against development of the ecotourism industry and argued that economic development through the latter should be the priority. The owner of a local tourism company stated that his company provides 17 seasonal jobs for the area and that the proposed aggregate operation may affect his plans to expand his operation. Other commenters, who believe that the operation may have a net positive economic outcome, argued that the economic benefits do not justify the environmental harm the quarry operation will cause.

Most commenters conveyed that the expected environmental, social and economic impacts of the proposed operation *and* the lack of adequate regulatory control mechanisms in place to address it make designation of the proposed operation under the *EAA* necessary. One organization argued that the *Planning Act* and its policies are inadequate to address the environmental concerns inherent in the Superior Aggregate proposal as they don't require the consideration of operational details. While they may be necessary, permits under the *OWRA* and the *EPA* will not address all significant details. Nor is it likely that operational details would be addressed before the Ontario Municipal Board (OMB), if planning matters are referred to the board, because the proposed quarry site is in non-*ARA* designated territory. Another commenter expressed doubt that the municipality would enforce compliance with any requirements that apply given the municipality's history on the file (for further details on this, please see "Other Information"). Because neither the *ARA* nor the *Mining Act* apply – a serious omission, according to one commenter, given that the intent of the GLHC initiative is to protect the natural resources of the area for sustainable uses – there is "a regulatory control gap." Some recognized that Superior Aggregates has made a public commitment to run the project in the spirit of the *ARA* but stated that there is no guarantee that the company will do so. One commenter remarked that even if the proposal were subject to the *ARA*, it still may be a worthy candidate for an individual environmental assessment (EA).

Commenters argued that the proposed operation should be subjected to the *EAA* because some of the operation's pressures on the environment could be mitigated through the thorough and transparent planning process afforded by the Act, and because the cumulative impacts of development on the whole site could be considered through this process. Some commenters asserted that an EA must be conducted to ensure that the operation is compatible with the GLHC initiative. One organization noted that MAH has indicated that it will not consider GLHC policies in its review of the township's rezoning application. Because MAH has taken this position, only an individual EA will ensure proper consideration of the Heritage Coast vision.

According to some, the controversial nature of the project and the fact that it has provincial and international, in addition to local implications, highlight the need for designation under the Act. One non-governmental organization remarked that the original intention was that the *EAA* would apply not only to the public sector, but also to the private sector, with some exceptions where necessary. The organization expressed the need for a reasonable mechanism to bring the private sector under the *EAA* and suggested that an *EAA* designation "would set a precedent that could be the beginning of a broader initiative to bring the private sector under the Act."

Some commenters rejected outright the idea of the project or registered their support for a full EA as only the second best option. These commenters emphasized that the damage caused would be irreparable, arguing that it is simply not appropriate to introduce heavy industry into "the longest essentially wild coastline remaining in the Great Lakes," suggesting rather that development should occur inland where more tolerant ecosystems exist. Some disputed that the proposed quarry could be reconciled with the GLHC, and stated that the quarry could open the way to more of the same kind of development along pristine areas of the Heritage Coast. Several commenters opposed to the project stated that the U.S. should find its own sources of aggregate and that the U.S. should not be permitted to retain its coast by destroying Ontario's.

Some commenters responded to MOE's request for input on the sections of the *EAA* that should apply. Commenters indicated that the broad definition of environment provided in s. 1(1) of the Act should be employed. Many stated that s. 6.1(2) of the *EAA* – especially the requirements that the proponent consider the need for, alternatives to and alternative methods of carrying out the undertaking – must apply and that the terms of reference (TOR) should not be scoped. One commenter also indicated that the provisions of s. 8 regarding mediation and s. 9 regarding a decision of either the Minister of the Environment or the Environment Review Tribunal should apply.

Some commenters further specified that the TOR for the project should be "generous and expansive" or outlined, in specific terms, items that should be included in or considered during its drafting. The TOR should require consideration of the direct, indirect and cumulative environmental impacts of the operation and require study of the broad range of potential impacts. Organizations argued that baseline studies of bird, plant and animal communities in the area must be conducted and that mitigation measures should be reviewed by a panel of wildlife biologists before any extraction is allowed to begin.

Many individuals and organizations emphasized the need for the EA to consider future development on the entire 386 hectares owned by Superior Aggregates, not just the 37 hectares on which the company plans to extract during its first five-year phase. If scoped to consider only 37 hectares, the EA will be "a piecemeal exercise."

Comments opposed to EAA designation

Many commenters opposed to the *EAA* designation remarked that the project is straightforward in nature and that therefore it does not warrant such a high level of provincial intervention. Several commenters emphasized the unprecedented nature of an aggregate operation *EAA* designation and asserted that the project is consistent with the GLHC mandate. According to one commenter, the GLHC concept "envisions traditional resource industry activities outside of the parks."

Most commenters opposed to the designation remarked on the adequacy of the requirements already applicable to the project and/or actions already being taken. One organization stated that the *Planning Act* provides for a comprehensive assessment and an EA would be redundant. Several organizations stated that additional opportunities to air environmental concerns through the planning process will be available as a result of the appeal to the OMB of the municipality's rezoning decision. Commenters pointed out that additional MOE permits will be required in the future, thereby ensuring further scrunity. Moreover, the rezoning of Superior Aggregate's property is subject to a holding provision requiring an appropriate site plan and stewardship agreement.

Commenters also stated that Superior Aggregates has behaved responsibly to date, noting that it was the company that initiated the rezoning process. It has also committed to following the social and environmental requirements of the *ARA* and has already conducted some studies and met with residents and First Nations groups.

Another commenter suggested that, instead of subjecting the undertaking to the *EAA*, MNR should either designate the area under the *ARA* or require Superior Aggregates to sign an agreement which legally binds the company to comply with the Act. One commenter insisted that if a designating regulation is issued under the *EAA*, it should be rescinded should the Township of Michipicoten become subject to the *ARA* at a later date.

Some commenters expressed concern that the "tremendous scope" of an EA hearing would have a "chilling" effect on other proposals for aggregate operations in non-*ARA* designated areas. According to some, an *EAA* designation could set a precedent which would prevent small and medium operations from entering the market, ultimately leading to less competition and increased aggregate prices.

Many of those opposed to the *EAA* designation raised concerns about the high costs of an EA and the delays that it would entail. The Township of Michipicoten wondered why MOE had taken so long to consider the designation request, noting that requests to designate the operation under the *EAA* were made as early as November 2002. The township argued that any further delay would result in the termination of the project.

Several commenters emphasized that the Wawa area is suffering an economic crisis and that the community cannot afford to lose the project. Many stated that Superior Aggregates will create much needed jobs for northern Ontario and serve as a catalyst in the renewal of the harbour. A renewed harbour is expected to attract additional business and employment to the area. According to one commenter, "the deep water dockage at Michipicoten harbour is the only harbour for 400 km of coast."

Some of those opposed to the *EAA* designation also remarked that Michipicoten Harbour had functioned as a wharf for outgoing and incoming industrial shipments for over a century. According to one commenter, past industrial uses did not adversely impact the environment. A commenter who characterized the site as a "brownfield" noted that the company had already begun a clean-up and asked, "Doesn't the province want to promote brownfield clean-up?"

Many submissions commented that the residents of Michipicoten demonstrated support for the project by voting in a municipal council in November 2003 that unanimously supports the project. Some remarked that the request for designation under the *EAA* was made without an understanding of the facts and before any public information about the project was distributed. The municipality also emphasized the need for local autonomy in planning decisions, arguing that the province itself has recently announced that it believes that "local planning decisions should be placed in the hands of local politicians."

While MOE's notice made clear that the ministry had decided not to designate the proposed operation under the *EAA*, the ECO believes that the ministry's summary of commenters' concerns and reasons for its decision could have included more details.

MNR's emergency exception notice (RB04E6011)

As noted above, MNR designated parts of the Territorial District of Algoma, including the proposed quarry site owned by Superior Aggregates, under the *ARA* in July 2004. MNR did not solicit public comments, through the Environmental Registry or otherwise, before making its decision to do so. Rather, it posted an emergency exception notice on the Registry in August 2004, informing the public after the decision was made.

MNR explained in the notice that the ministry did not post a regular proposal notice on the Registry as the situation constituted a risk to the environment and therefore, an emergency under the *Environmental Bill of Rights*. According to the ministry: "Widespread prior public notification of a regulation such as this could result in aggregate operators taking steps to be considered 'established' prior to passage of the regulation in an attempt to avoid complying with all of the requirements for new operations under the *ARA*." MNR explained that aggregate operations which are legally established at the time of designation of a territory under the *ARA* are subject to a more limited set of requirements, including environmental requirements.

The ECO recognizes that the *ARA* exempts operators who are already legally established on newly designated territory from certain requirements. Under s. 71(7) of the Act, owners of established pits and quarries who apply for a licence within six months of the designation are exempt from prescribed public notification and consultation requirements and from the s. 12 requirement that the minister "have regard to" certain environmental and social impacts of the operation before granting a licence. Under s. 71(8), owners of established operations who apply for an *ARA* licence within two years of the designation are exempt from public notification and consultation requirements only.

MNR did not do an adequate job of explaining in the exception notice why this situation constituted an emergency. The ministry did not provide any evidence that aggregate operations would actually attempt to become established before the area became designated. Moreover, there is precedent for consulting through the Registry on regulations to designate territory under the *ARA*. In 1997-98, when MNR was considering subjecting other parts of the Territorial District of Algoma and the Territorial District of Sudbury to the Act, the ministry posted a regular notice, seeking public comment, on the Registry. The decision to designate the two districts, made in 1998, was also subject to direct consultations involving local municipalities and aggregate producers.

The ECO and various Ontario Cabinet ministers, especially the Ministers of Natural Resources, Environment and Municipal Affairs and Housing, received a number of letters from individuals and organizations subsequent to MNR's decision. Local residents expressed concern to the ECO about the failure of MNR to consult on its decision and questioned whether the decision really was an emergency. According to one individual, MNR did not know how many operators would be affected by the regulation prior to its finalization, nor did MNR's Wawa District Office have any prior knowledge of the decision or maps delineating the prescribed sites. The ministry did not take steps to make its decision known province-wide; it sent its July 2004 press release to the local media only.

Letters sent to the Minister of Natural Resources and copied to the ECO urged the ministry to take into consideration GLHC policies when making decisions about Superior Aggregates' *ARA* licence, especially given that MAH has indicated that it would not consider such policies in making planning decisions regarding the site. Letters also urged the minister to exercise his authority under s.7(5) of the *ARA*, should Superior Aggregates submit an application for a licence which considers impacts on only 35 hectares, to require an application that reflects the company's long-term extraction plans.

In letters to the Minister of the Environment and to the ECO, some individuals stated that the *ARA* designation is a positive step. However, most expressed concern that the move would "remove the need for a full EA." Some individuals expressed anxiety about a statement attributed to an MNR spokesperson in a Toronto Star article indicating that "the ministry hopes that designation…under the *Aggregate Resources Act* will head off a possible environmental assessment of the Superior Aggregates project." Some individuals also took issue with the statement of the Minister of Natural Resources that the *ARA* legislation is as good or better than an EA, and remarked that public comments made by the minister suggest that there is "a misunderstanding on the scale of the proposal and the nature of the lands affected."

Many letters issued to the ECO, MNR and MOE following the *ARA* designation, outlined why, in the opinion of the authors, the *EAA* is better equipped than the *ARA* to address the impacts of the proposed aggregate operation. The *ARA* licensing process will not be as thorough and comprehensive as an EA, according to a number of individuals. It will not adequately address the full suite of environmental, social and economic concerns raised, including noise and dust and impacts on local parks, caribou populations and the ecotourism industry. The *ARA* process will not permit consideration of GLHC policies or consider whether the quarry is an appropriate use of the coastline.

The letters argued the need to consider the rationale for the project and a reasonable range of alternatives (both to the project and to the method of carrying it out), stating that these considerations do not apply under the *ARA*. One individual stated that, while the *ARA* requires rehabilitation, only under the *EAA* would the "feasibility of rehabilitating to an environmentally acceptable standard" be considered. The *ARA* licensing process, unlike an EA, would not consider whether the entire property would be impacted. Nor will it address the fact that the Superior Aggregate operation will trigger further opening of the GLHC shoreline to aggregate extraction.

The letters urged MOE to "support the wishes expressed by 4,600 of the approximately 5,700 responses" in favour of an EA. Some letters to MNR encouraged the ministry to "urge the Minister of the Environment to designate the operation under the *EAA*."

MNR's ARA instrument proposal notice (IB04E2006)

After the *ARA* instrument proposal notice was posted in December 2004, local residents expressed concern to the Ministers of the Environment and Natural Resources that they were not able to make copies of the technical reports submitted to MNR by Superior Aggregates as a part of the licence application. The studies were available, for viewing only, at MNR's Wawa District Office. Subsequently, a lawyer retained by a local residents' group issued a request pursuant to the *Freedom of Information and Protection of Privacy Act* for copies of the licence application and all supporting documents, including studies.

SEV

MOE considered its SEV in making its decision regarding the designation of the proposed quarry under the *EAA*. MOE indicated that the principles of environmental protection, the ecosystem approach and resource conservation were relevant to this exercise. In particular, MOE explained that the proposal to designate under the *EAA* is a "precautionary measure" to ensure that all potential environmental effects are identified and subsequently avoided or minimized. MOE explained that the broad definition of the *EAA* allows for the consideration of environmental, economic and social considerations and the relationships between them, and that its proposal is therefore in keeping with an ecosystem approach. MOE also stated that the *EAA* process involves the consideration of how the proposed quarry could operate in a way that "provides for the protection, conservation and wise management of the environment."

MOE's SEV consideration did not appear to reflect the fact that the ministry had decided not to designate the operation under the *EAA*. Specifically, it did not explain whether or how the principles of environmental protection, the ecosystem approach and resource conservation affected its decision not to designate the proposed quarry and whether the ministry believed that these approaches would be adequately incorporated in any alternative approach required.

Other Information

Great Lakes Heritage Coast

In March 1999, then premier Mike Harris announced that the Great Lakes Heritage Coast would be recognized as one of nine signature sites under Ontario's Living Legacy (OLL). The Heritage Coast was identified as a 2,900-kilometre stretch of shoreline which includes all of Ontario's coastline of Lake Superior, the north shore of the St. Mary's River, the north channel of Lake Huron and the eastern coast of Georgian Bay. The Heritage Coast concept was established to recognize the "internationally significant natural, cultural, scenic and recreation values" of the shoreline. MNR's July 1999 OLL Land Use Strategy clarifies that the Heritage Coast characterization does not, however, constitute a land use designation and states that the policy only applies to Crown lands and waters.

The GLHC project, initiated in January 2000, involved consultations with a range of stakeholders – including environmental groups, businesses, the federal government, Aboriginal leaders and members of communities residing along the coast – on the idea of the Heritage Coast and on how to implement it. After soliciting public comments through the Environmental Registry on the outcome of its consultations, MNR issued "Charting the Course," a final discussion document, in 2001.

Charting the Course articulates a refined vision statement, guiding principles and a series of recommendations. The principle of protection, given first priority, expresses the need to guard the wilderness beauty and the ecosystems of the shoreline. The principle of development states that any "new sustainable development that takes place should complement the coastal ecosystem." Charting the Course indicates that the vision and guiding principles are expected to guide all future actions on provincial Crown lands on the coast. It is "hoped" that they will influence the use of private, municipal and federal lands. "The role of the Heritage Coast with respect to private lands will be to support and encourage municipalities and landowners to manage their lands consistent with the vision of the Heritage Coast through the provision of information, advice and expertise." The document recommends the development of a strategy for the Heritage Coast and the establishment of a steering committee to advise the minister on its preparation. John Snobelen, then Minister of Natural Resources, endorsed the report and announced that the government had accepted its recommendations.

Municipal land rezoning

While the Township of Michipicoten did rezone the 35 hectares of land along the Lake Superior shoreline in the harbour in November 2003 to allow for quarrying, it did not do so on its own volition. In July 2002, local residents opposing the quarry proposal wrote the municipality, questioning the suitability of the current zoning of the site for a quarry. Several months later, after banding together to form a group, local residents retained legal counsel. In September 2002, the lawyer provided a legal opinion to the municipality arguing that a re-zoning by-law was required. Without a re-zoning, the residents' group would not have the opportunity to make a submission before a public meeting of municipal council. When the township responded that the proposed activity did not violate the current by-law, the group decided to litigate.

The residents group delivered court applications and supporting documents to the township and Superior Aggregates in January 2003. After reviewing the application, Superior Aggregates decided that it would apply to the municipality to have the 35 hectares rezoned. Although the municipality maintained that a re-zoning was not necessary, it accepted and processed the company's application. As required under s. 17(15) of the *Planning Act*, the municipality gave public notice and held a public meeting on October 7, 2003, prior to adopting the official plan amendment and the implementing by-law. Representatives of the residents group made a submission to the township which argued for the expansion of the official plan amendment (OPA) subject lands to include the full 386 hectares of land, with phased zoning or holding zones. Nevertheless, the OPA and by-law amendment adopted by the township applied to only 35 hectares.

In December 2003, an Ontario Superior Court judge heard the case and ruled that a re-zoning for the proposed use was required. The judge found that "the township had no intention of requiring a rezoning application and hearing regarding the unquestioned proposed development" and that the re-zoning occurred only due to the initiative of Superior Aggregates. The judge remarked: "It appears that this council was prepared to take any steps necessary to deprive the taxpayers of a hearing to determine the rights of all interested parties as required by law. Absent this application, the project would have proceeded with the resulting illegal non-conforming use of the property." The judge directed the municipality to pay the applicants their application ($5,891.49) and hearing costs.

Designation of significant resource areas of Ontario under the ARA

In 1998, the ECO received a request for a review by applicants concerned about quarry operations in Armour Township, Parry Sound. The applicants expressed concern that their township was not designated under the *ARA* and alleged that unregulated aggregate extraction in their municipality was causing environmental harm, including damage to neighbouring properties, erosion, fish habitat destruction and failure to rehabilitate gravel pits. (For further information please refer to the ECO's 1998 annual report, page 272).

While MNR did not undertake the review, it did highlight to the applicants its "long-standing position that all significant aggregate resource areas of Ontario should be designated under [the] *ARA*." MNR's response of September 1998 explained that the additional cost to the government in delivering programs under the *ARA* in new areas had prevented it from designating new areas. The ministry explained, however, that June 1997 amendments to the *ARA* had transferred some of the responsibilities under the Act to the aggregate industry and had thereby lessened the financial burden on MNR to administer the Act. In March 2005, MNR confirmed that its policy to designate all significant aggregate resource areas of the province is still in place.

In its response letter, MNR also explained that it planned for an "incremental approach where designations are phased-in sequentially by region and preferentially adjacent to existing designated areas." The ministry's criteria for determining the priority of designation included: production; population; municipal acceptance/concerns; environmental issues; quality and quantity of aggregate resources; land use/development pressures; and control by other legislation.

Since 1998, MNR has issued only two regulations designating territory under the Act. The first, filed in November 1999, added the Village of Hilton Beach to *ARA* designated territory. The second designating regulation, filed in July 2004 was to subject the Township of Michipicoten and 12 surrounding townships to the requirements of the Act. Armour Township in Parry Sound and other significant aggregate resource areas remain undesignated.

ECO Comment

This case draws attention to the failure of MNR to subject significant aggregate rich areas in the province, especially those in the north, to the *Aggregate Resources Act* (*ARA*) in a timely manner and as promised. As noted, the ministry committed, at least as far back as 1998, to designate all significant aggregate resource areas of Ontario under the Act. The Township of Michipicoten and other parts of the Territorial District of Algoma were among the aggregate rich areas of northern Ontario that were not designated under the *ARA* when Superior Aggregates purchased a plot of land on the north shore of Lake Superior in Michipicoten Bay and first made known its intention to establish a quarry. Superior Aggregates' land abuts shoreline which comprises part of the Great Lakes Heritage Coast (GLHC). In addition to being rich in the supply of quality aggregate, Michipicoten Bay is a desirable location for an aggregate operation from an economic perspective, given its easy access to markets via the Great Lakes.

In the absence of an adequate regulatory framework to address Superior Aggregates' planned aggregate operation, the Ministry of the Environment (MOE), with urging from local residents and other concerned groups, made an attempt to fill the void by proposing to designate the operation under the *Environmental Assessment Act* (*EAA*) to make the operation subject to the requirements of that Act. It was only after MOE's proposal was made that MNR moved to designate under the *ARA* parts of the District of Algoma, including the Township of Michipicoten, thereby ensuring that the requirements of the *ARA* would apply to the proposed Superior Aggregates quarry.

The ECO believes that MNR's decision to designate such lands under the *ARA* can allow for the evaluation of the major direct environmental and social impacts of the planned operation. In fact, the ECO believes that the move to subject the Township of Michipicoten and other non-designated areas with extraction potential to the *ARA* should have been made years ago. Given the designation of the area as part of the GLHC, the ECO would have expected that adequate control mechanisms to address aggregate operations along the north shore of Lake Superior would have been put in place. The ECO encourages the ministry to meet its commitment to designate all other significant resource areas of the province under the *ARA*, and notes that the aggregate industry has expressed support for such designation, in a phased manner, as well.

The ECO agrees with MOE's statement, made in its December 2004 decision notice (RA04E0001) that, taken together, the *ARA*, the *Planning Act*, the *Environmental Protection Act* and the *Ontario Water*

Resources Act "have the scope to address the key environmental concerns and the public interest." The *ARA* provides a comprehensive framework for the consideration and management of the environmental and social impacts of an aggregate operation throughout its lifecycle.

Moreover, while an individual EA could have provided for a broadly scoped assessment, a full examination of the need for and alternatives to the quarry operation would not have been guaranteed had the operation been designated under the *EAA*, as suggested by many of the commenters in favour of an individual EA. Nor would designation under the *EAA* have provided assurance that all of the issues in contention would have been addressed.

In addition to providing a regime which theoretically allows for consideration of an array of issues, the *ARA* requires public notification and consultation for new operations and progressive and final rehabilitation. As well, the Act provides for ministry inspection and compliance enforcement. The ECO does note that there have been some shortcomings in the application of the Act. In an internal review of the effectiveness of its Aggregates Resources Compliance Program several years ago, the ministry found that generally, the quality of the annual compliance reports submitted by aggregate operators to be poor. Deficient reports commonly omitted information such as excavation depth, rehabilitation information, site sketches or information regarding consultation with municipalities (for further information, refer to page 143 of the ECO's 2001/2002 annual report). The ECO has also observed that MNR consistently fails to meet its annual targets for compliance monitoring (for further information, refer to pages 62-63 of the ECO's 2003/2004 annual report) and that overall, the rehabilitation of old pits and quarries in Ontario is not keeping pace with land degradation through the establishment of new pit and quarry operations, despite the requirements of the Act (for further information, refer to page 30 of the ECO's 2002/2003 annual report). Furthermore, the ECO believes that MNR can do a better job of providing public access to information and key documents – such as MNR's "Aggregate Resources of Ontario, Provincial Standards" – which outline public consultation and other requirements of pits and quarries operating in the province.

At the same time, the ECO has also observed a number of serious shortcomings with compliance monitoring and enforcement under the *EAA*. In our 2003/2004 annual report, the ECO observed that MOE does not have the resources to properly monitor the large number of approvals it issues under the Act. The ministry, rather, employs a complaint-driven approach to monitoring. Not only is MOE "practically unable to prosecute proponents for failure to comply with the *EAA*," members of the public are also prevented from doing so. Barriers to prosecution under the Act include the unrealistically short six-month statute of limitation and the inability of members of the public to easily access relevant EA approval documents.

As recommended in our 2003/2004 annual report, MNR should ensure that all aggregate operations – including the Superior Aggregates quarry, if approved – comply with existing rules under the *ARA*. As per their 2000 protocol to address environmental complaints regarding pit and quarry operations in the province, MOE and MNR should work together to ensure compliance – in an expeditious and efficient manner – with all applicable Acts including the *ARA*, the *Ontario Water Resources Act* and the *Environment Protection Act*.

Finally, the ECO encourages MNR to develop a strategy for the GLHC in order to give further focus to the concept. Through discussions with the public, MNR should clarify what the concept really means in practical terms, particularly what protections against aggregate operations and other industries are afforded to what Crown lands along the coast. MNR should not wait until future proposals for key development projects along the GLHC emerge to have this important public debate.

MINISTRY OF MUNICIPAL AFFAIRS AND HOUSING

Review of Posted Decision:
Greenbelt Act, 2005 and Greenbelt Plan

Decision Information:

Greenbelt Act, 2005

Registry Number: AF04E0001
Proposal Posted: October 28, 2004
Decision Posted: Not posted as of July 2005
Comment Period: 30 days
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Greenbelt Plan

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Decision Implemented: December 16, 2004

Description

Greenbelt Act

During the 2003 provincial election, the government committed to creating a greenbelt area in the Greater Golden Horseshoe (GGH). Right after the election, in December 2003, the government introduced Bill 27, the *Greenbelt Protection Act, 2003*, to designate a Greenbelt study area and place a temporary moratorium on development in that area. A Greenbelt Task Force conducted public consultation and made recommendations that led to the introduction of the *Greenbelt Act, 2005*. This new law was enacted in February 2005, and reflected the work of the Task Force. The Act provides the authority to establish the Greenbelt Plan (GBP) and to deal with other details such as transition issues, special provisions for prescribed lands, local official plan conformity, and conflict with existing planning documents. The *Greenbelt Act* also establishes the Greenbelt Council to advise the Minister of Municipal Affairs and Housing on matters relating to the Act.

The *Greenbelt Act* is framework legislation that gives the government authority to protect a greenbelt of environmentally sensitive and agricultural land in the Golden Horseshoe from urban sprawl. The Act provides that the Greenbelt Area shall include the areas covered by the Oak Ridges Moraine Conservation Plan and the Niagara Escarpment Plan, and permits Cabinet to designate other areas of land, described as the "Protected Countryside," and to amend these designations by regulation. (This change was implemented when the Ontario government passed O. Reg. 59/05, filed on February 28, 2005.) The Protected Countryside may not be amended by regulation to reduce the total land area within the greenbelt. However, it would be open to future governments to increase or decrease the size of the Protected Countryside by amending the *Greenbelt Act* and other relevant laws.

The *Greenbelt Act* allows Cabinet to establish a GBP for all or part of the Greenbelt Area. The Act specifically states that the GBP is neither a regulation nor an undertaking under the *Environmental Assessment Act*, although the *Environmental Assessment Act* continues to apply in areas covered by the GBP. The *Greenbelt Act* does not take precedence over the provisions of the *Oak Ridges Moraine Conservation Act* (*ORMCA*) or the *Niagara Escarpment Planning and Development Act* (*NEPDA*) with respect to applications, matters or proceedings that relate to the Oak Ridges Moraine Conservation Plan (ORMCP) or the Niagara Escarpment Plan (NEP). The Act states that if there is a conflict between the GBP and either the ORMCP or the NEP, the ORMCP or NEP will prevail over the GBP in its area of application. However, Cabinet has been given the power to make regulations to vary, supplement or override any provision in the ORMCP or the NEP in order to facilitate the effective operation of the GBP. Another provision clarifies that the *Greenbelt Act* is to prevail in the event of a conflict between it and any other Act.

The GBP also prevails where there is a conflict with an official plan, zoning by-law or provincial policy statement. Municipal councils and planning authorities located in any of the areas designated as Protected Countryside in the GBP must amend every official plan to conform with the GBP by certain specified dates. An official plan may not be more restrictive than certain policies specified in the GBP.

The numerous objectives of the GBP are set out in detail in the Act and include the following:

- Establishing a network of countryside and open space areas which support the Oak Ridges Moraine and the Niagara Escarpment;
- Sustaining the countryside, rural and small towns and contributing to the economic viability of farming communities;
- Preserving agricultural land as a continuing commercial source of food and employment;
- Providing protection to the land base needed to maintain, restore and improve the ecological and hydrological functions of the Greenbelt Area;
- Promoting connections between lakes and the Oak Ridges Moraine and Niagara Escarpment;
- Providing open space and recreational, tourism and cultural heritage opportunities to support the social needs of a rapidly expanding and increasingly urbanized population;
- Promoting linkages between ecosystems and provincial parks or public lands;
- Controlling urbanization of the lands to which the GBP applies; and
- Ensuring that the development of transportation and infrastructure proceeds in an environmentally sensitive manner.

The Act also specifies examples of the types of policies that may be set out in the GBP. These include policies that:

- Designate land use;
- Support co-ordination of planning and development programs of provincial government ministries and among municipalities;
- Prohibit any use of land or the erection, location and use of buildings or structures for, or except for, specific purposes;
- Relate to land and resource protection and land development;
- Guide the economic and physical development of the land, including the management of land and water resources, the development of major servicing, communication and transportation systems and cultural, recreational and tourism facilities, and the provision of major parks and open spaces;
- Prohibit official plans and zoning by-laws from containing provisions that relate to specified matters and are more restrictive than such provisions in the GBP; and
- Support the long-term viability of agriculture in the Protected Countryside.

Decisions made under the *Ontario Planning and Development Act, 1994*, the *Planning Act* or the *Condominium Act, 1998* by decision-makers such as a municipal council, provincial ministry officials or the Ontario Municipal Board (OMB) must conform with the GBP, as must comments, submissions or advice affecting a planning matter. This does not apply to a provincial policy statement issued on under s. 3 of the *Planning Act*. However, it does apply to all applications, matters or proceedings commenced on or after December 16, 2004 relating to areas designated as Protected Countryside in the GBP, although some applications, matters or proceedings commenced before December 16, 2004 may be prescribed to conform with specific policies of the GBP. Decisions on applications, matters or proceedings commenced before December 16, 2004 are not required to conform with the GBP. Within the Greenbelt Area, municipalities are prohibited from undertaking any public work, improvement of a structural nature or other undertaking, or from passing any by-law, that conflicts with the GBP.

A review of the GBP must be carried out every 10 years in conjunction with reviews of the Oak Ridges Moraine Conservation Plan and the Niagara Escarpment Plan. The Act requires the minister to consult with affected public bodies, including MNR, the Niagara Escarpment Commission, the Greenbelt Council established under the *Greenbelt Act* and municipalities, and ensure that the public is given an opportunity to participate in this 10-year review.

In addition to making changes during a 10-year review, the Minister of Municipal Affairs and Housing may propose amendments to the areas designated as Protected Countryside in the GBP at any time. Notice of a proposed amendment must be given to each municipality that has jurisdiction in the part of the Greenbelt Area where it would apply and areas nearby and to any other prescribed person or public body, and must allow for written submissions within a specified period of time. As with the review process, the minister must also consult on proposed amendments with affected public bodies and the public. After considering submissions, the minister may recommend that Cabinet approve the amendment or appoint a hearing officer to hold a hearing on the proposal and then report and make a recommendation on the proposal. However, the minister cannot recommend an amendment to Cabinet if it reduces the total land area in the GBP. The Cabinet makes the final decision on an amendment and it is not subject to appeal.

The minister retains the power to make a zoning order under s. 47 of the *Planning Act* with respect to Protected Countryside areas, or a plan or plan amendment under the *Ontario Planning and Development Act, 1994*, under the GBP. Such an order, plan or plan amendment is not required to conform with the GBP or any other provisions of the *Greenbelt Act*, nor is it required to be consistent with the Provincial Policy Statement (2005 PPS) under s. 3 of the *Planning Act*.

If a matter that relates to land in the Protected Countryside areas of the GBP is appealed or referred to the OMB, the minister may tell the OMB to defer consideration of the matter and appoint a hearing officer to conduct a hearing instead. After a hearing is held, the hearing officer is required to make written recommendations, with reasons as to what action the minister should take in the matter and the minister may decide whether or not to follow these recommendations, with the approval of Cabinet.

The *Greenbelt Act* includes provisions limiting causes of action and remedies in relation to this Act. It explicitly states that nothing done under the Act or its regulations constitutes an expropriation.

Although the legislation was passed in February 2005, a provision in the Act deems it to have come into force on December 16, 2004, making it retroactive. This was necessary because the *Greenbelt Protection Act, 2003*, which had placed a one-year moratorium on development in the Greenbelt Area, was repealed on that date. The minister and Cabinet are given regulation-making powers and these regulations also may be retroactive to December 16, 2004.

Greenbelt Plan

The final Greenbelt Plan (GBP) was released by MAH on February 28, 2005. The GBP applies to the approximately 400,000 hectares of land described as Protected Countryside. This area, combined with NEP and ORMCP lands makes the total area of the Greenbelt approximately 728,000 hectares. The GBP also complements and supports the Parkway Belt West Plan and the Rouge North Management Plan.

The GBP is guided by a vision to permanently protect the Protected Countryside located beyond the urban boundaries of municipalities around the GGH Area (from Peterborough to Niagara Region). The GBP is one piece of a larger effort by the province to curb urban sprawl in southern Ontario in order to preserve agricultural lands and protect natural features and functions. The GBP's more detailed vision is multi-pronged, aiming to ensure that within the Greenbelt area:

- Agriculture remains the predominant land use;
- Natural heritage and water resource systems are permanently protected; and
- "Economic and social activities associated with rural communities, agriculture, tourism, recreation and resource uses" are supported.

The Greenbelt's Protected Countryside includes a Natural System and an Agricultural System. The GBP contains provisions designed to protect features essential to both of these systems. The Protected Countryside also contains Settlement Areas (existing towns/villages & hamlets) that are not subject to the policies of the GBP but are governed by the official plan of the municipality within which they are located.

The Natural System
The Natural System includes a Natural Heritage System (NHS) and a Water Resource System, each with policies for the protection, enhancement, and rehabilitation of key system features. NHS policies apply within the NHS which, according to MAH, constitutes 53 per cent of the area of the Protected Countryside and encompasses approximately 85 per cent of the Protected Countryside's key natural heritage and key hydrologic features (see text box, below).

The GBP states that the NHS is not a land use designation in and of itself with a list of permitted uses; instead, uses permitted within the Protected Countryside are subject to the constraints of the Natural System. Any key natural heritage features located outside of the NHS are subject to the policies of the Provincial Policy Statement (PPS). However, GBP policies protecting key hydrologic features apply both within the NHS and across the Protected Countryside.

Key Natural Heritage Features include:

- Significant habitat of endangered species, threatened species, and special concern species
- Fish habitat
- Wetlands
- Life Science Areas of Natural and Scientific Interest (ANSIs)
- Significant valleylands
- Significant woodlands
- Significant wildlife habitat
- Sand barrens, savannahs and tallgrass prairies
- Alvars

Key Hydrologic Features include:

- Permanent and intermittent streams
- Lakes (and their littoral zones)
- Seepage areas and springs
- Wetlands

A full range of existing and new agricultural uses is permitted within the NHS. However, in keeping with the GBP's goal to permanently protect key features, any new development or site alteration that the GBP permits within the NHS must not negatively impact on key features or their functions. It should be noted, however, that there are other permitted uses falling outside of the categories of development or site alteration that can potentially impact on these key features and their functions. The section on permitted uses describes policies applicable to these uses.

To protect key features, new development and site alteration must maintain and, if possible, enhance connectivity between features in order to preserve corridors for native vegetation and wildlife movement. Further, new development must not disturb more than 25 per cent of the developable area of a site, impervious surfaces must not exceed 10 per cent, and at least 30 per cent of the site must remain or be returned to natural, self-sustaining vegetation.

Natural heritage and hydrologic evaluations must be completed for any new development within 120 metres of key features in order to determine the appropriate width for required vegetation protection zones. Further, there is a mandatory requirement that minimum 30 metre wide vegetation protection zones be established around certain key features within the NHS including: wetlands, seepage areas/springs, fish habitat, permanent and intermittent streams, lakes, and significant woodlands. Finally, steps must be taken to maintain the connectivity between key features located within 240 metres of each other.

The GBP also requires that all planning authorities provide for a "comprehensive, integrated, long-term approach to protect, improve, and restore the quality and quantity of water." Municipalities are also required to restrict development in vulnerable surface and groundwater areas in order to protect the quality and quantity of surface and groundwater. More detailed policies for surface and groundwater management and protection are expected to emerge when the proposed *Drinking Water Source Protection Act* is finally enacted in late 2005 or 2006.

The Agricultural System

The Agricultural System under the GPB includes specialty crop areas, prime agricultural land, and rural land. The province has designated lands as specialty crop area in both the Niagara Region and the Holland Marsh. Municipalities are responsible for identifying prime agricultural land and rural land within the Protected Countryside and for appropriately designating these lands in their official plans when these plans are brought into conformity with the GBP. Within all three of the Agricultural System's land use sub-categories "normal farm practices and a full range of agricultural, agriculture-related and secondary uses are supported and permitted." According to MAH, approximately 11 per cent of the Protected Countryside is specialty crop area, 57 per cent is prime agricultural land, and 17 per cent is rural land. The remaining 15 per cent is the area taken up by existing settlement areas within the Protected Countryside.

To achieve the GBP's goal of farmland preservation, re-designation of lands in the Agricultural System to non-agricultural uses is controlled via policies providing the strongest protection for specialty crop areas followed by prime agricultural lands and rural lands. These protections include a policy prohibiting the expansion of urban settlement areas located *outside of* the Protected Countryside anywhere into the Protected Countryside.

Municipalities proposing to expand settlement areas (towns and villages) located within the Protected Countryside can only do so during the mandatory 10-year GBP review and must support these proposals with a comprehensive justification or a growth management study. Further, only modest expansions of settlement areas within the Protected Countryside will be considered but not into the NHS or specialty crop areas. However, such settlement areas can expand into other prime agricultural lands.

The GBP also includes policies controlling lot severances and prohibiting the development of estate-style, adult lifestyle and retirement communities anywhere in the Protected Countryside as well as a policy prohibiting any new Great Lakes based water/wastewater servicing unless a settlement area's existing servicing is creating a public health concern.

Permitted Uses

While the GBP's vision is to ensure that agriculture is the predominant land use and key natural heritage features are permanently protected, it is also to support "economic and social activities associated with rural communities, agriculture, tourism, recreation and resource uses." This means that some non-agricultural activities and uses, including mineral aggregate operations and development of infrastructure and recreational facilities, are permitted in both the Protected Countryside and the NHS.

Existing uses are generally permitted in the Protected Countryside, including the expansion of existing buildings and structures, although these expansions should avoid key natural heritage features if possible. In addition to requirements to protect the natural system described above, new proposals for non-agricultural uses must demonstrate that the use is appropriate for a rural location and that water/wastewater services are adequate for the proposed use.

Recreational uses, including major uses such as ski hills, golf courses, and campgrounds are permitted within rural areas of the Protected Countryside, subject to conditions. The GBP requires that proposals for major recreational uses in the NHS include a vegetation enhancement plan and a conservation plan designed to minimize water, nutrient, and biocide use.

Limited shoreline development is permitted along Lake Ontario, Lake Simcoe, and Lake Scugog and can include infill, redevelopment, rounding out of existing developed areas, and resort development. However, development is subject to certain GBP requirements, including the application of Natural System policies, the establishment of minimum 30 metre wide vegetation protection zones along shorelines, and the enhancement of sewage disposal systems in order to reduce any nutrient loadings to lakes.

New mineral aggregate operations are permitted in the NHS and within its key natural heritage features, with the exception of significant wetlands, significant woodlands, and the significant habitat of threatened or endangered species. New or expanded mineral aggregate operations within the NHS are subject to enhanced site rehabilitation requirements as set out in the Greenbelt Plan. Any such operations within the Protected Countryside but outside of the NHS are subject to a more limited list of enhanced rehabilitation requirements. Finally, no new aggregate operations can be established within the specialty crop area between Lake Ontario and the Niagara Escarpment Plan area.

The GBP also permits renewable resource activities including forestry, water-taking, fisheries, conservation, and wildlife management activities throughout the Protected Countryside. These activities are also permitted within key natural heritage features if the use can be undertaken in a way that maintains or improves these features and their functions.

New infrastructure and the expansion, extension, and operation of existing infrastructure are permitted anywhere in the Protected Countryside. Proposals must demonstrate that the infrastructure supports permitted rural activities or that it provides for infrastructure connections between urban growth centres, and between growth centres and international borders. Where "practicable", the GBP requires that existing infrastructure be optimized to preserve the rural character of the Protected Countryside and to reinforce the goals of both the GBP and any growth plans that evolve out of the *Places To Grow Act* and Plan.

Infrastructure includes:

- Sewage and water systems
- Sewage treatment systems
- Waste management systems
- Electric power generation and transmission including renewable energy systems
- Communications/ telecommunications
- Transit and transportation corridors and facilities
- Oil and gas pipelines and associated facilities

Infrastructure impacts on Protected Countryside lands must be "minimized", especially within the NHS. Further, all key natural heritage features must be avoided, unless the need for the infrastructure has been demonstrated and there are no reasonable alternative locations.

Plan Implementation

Affected municipalities must bring their official plans into conformity with the Greenbelt Plan no later than the time of the required official plan five-year review, or by the date specified by the Minister of Municipal Affairs and Housing. It is at this time that municipalities can fine-tune prime agricultural and rural land designations. Municipalities can also adopt policies that are more stringent than the GBP's policies – except in the case of agricultural and mineral aggregate policies – provided they do not conflict with the GBP.

The GBP also requires the establishment of a Greenbelt Council whose duties will include tracking success of GBP implementation, identifying issues emerging from implementation, and advising on the development of GBP performance measures. Performance measures are to be established through MAH's Municipal Performance Measurement Program. The Council will also play a key role in setting the parameters and scope of the GBP's 10-year review.

Implications of the Decision

The Greater Golden Horseshoe (GGH) area is one of the fastest growing regions in North America. The area is currently home to approximately two-thirds of Ontario's population (7.8 million in 2001) and the province projects that another 4 million people will settle in the area by 2031. Inefficient land use patterns began to emerge in the GGH area after the Second World War as automobile ownership became the norm, thereby making the option of living in the suburbs feasible for greater numbers of Ontarians. This dynamic has, in turn, led to the consumption of significant amounts of southern Ontario's agricultural lands and natural areas. Between 1976 and 1996, 60,000 hectares of farmland were lost to urbanization in the greater Toronto area alone. Urban sprawl continues to threaten remaining lands and has generated the necessary political and economic pressure for the provincial government, after an extended absence, to assume a leadership role in coordinated regional and provincial level planning in the GGH.

The GBP and *Greenbelt Act* constitute a critical component of a suite of initiatives being developed by the provincial government to tackle land use challenges in the GGH area and beyond. Originally, they were to unfold in tandem with the *Places to Grow Act* – an Act that gives the provincial government the power to establish growth management areas throughout the province - and an associated growth management plan for the GGH area. One stakeholder described the critical importance of the combined impact of these initiatives very appropriately by explaining that, "if the Greenbelt is the yin of smart growth, then growth management or Places to Grow is the yang."

Unfortunately, the two proposals have not moved forward in tandem. While the *Greenbelt Act* and GBP are now in force, the *Places to Grow Act* was passed on June 13, 2005, and the growth management plan for the Greater Golden Horseshoe area is yet to be finalized. For various reasons, many stakeholders believe the delay in completion of growth management planning initiatives is extremely problematic. Representatives from the development industry argue that delays have created a scenario where the rules and requirements are too uncertain. Urban development experts warn that a GBP without a solid associated growth management strategy is doomed to failure.

Greenbelt Act

The *Greenbelt Act* is an important and potentially beneficial piece of legislation given its objectives of protecting environmentally sensitive and agricultural areas in the GGH greenbelt from the encroaching urban sprawl. In structure and in many of its provisions, the Act mirrors and extends the reach of the *Oak Ridges Moraine Conservation Act*. Some of the ways in which the *Greenbelt Act* differs from the *ORMCA* reflect the experience gained by MAH in implementing the *ORMCA* thus far, as well as the significance of the government's commitment to the Greenbelt Area.

Many of the powers that were given to the Minister of Municipal Affairs and Housing under the *ORMCA* are instead given to Cabinet in the *Greenbelt Act*. The authority given to Cabinet includes: designate land to the Greenbelt Area; establish a Greenbelt Plan; override provisions in the NEP or ORMCP; approve amendments to the Plan; and order that a hearings officer consider proposed amendments to the Plan and make recommendations to the minister and Cabinet. Under the *ORMCA*, the minister possessed these types of powers. The transfer of these authorities to Cabinet confirms the importance of the *Greenbelt Act* and the need for consideration by more than just one minister when significant decisions are made.

In contrast to the *ORMCA*, which provided that the ORMCP be established by minister's regulation, the *Greenbelt Act* gives Cabinet the power to establish a Greenbelt Plan, but specifically provides that the Greenbelt Plan is not to be a regulation. This means that the Greenbelt Plan has the status of a policy, and is not legally enforceable as a regulation in the same way as the ORMCP. The *ORMCA* contains offence provisions with penalties applying to anyone who contravenes a prohibition or fails to comply with a restriction in the ORMCP, or fails to comply with an order under the *ORMCA*. The *Greenbelt Act*, however, includes no offence provisions.

The *Greenbelt Act* preserves land around and in the Oak Ridges Moraine and Niagara Escarpment areas but does not revoke or replace the *ORMCA* or *NEPDA*, the existing laws which govern those areas. This raises the question of which of these land use planning regimes should take precedence in the case of a conflict. The *Greenbelt Act* deals with this issue by providing that the ORMCP and NEP prevail over the Greenbelt Plan in their areas of application unless Cabinet makes a regulation stating otherwise. However, the Act also allows Cabinet to make regulations to override anything in the ORMCP or the NEP if necessary for the operation of the Greenbelt Plan, and provides that the *Greenbelt Act* prevails where there is a conflict between it and any other Act. It seems likely that conflicts will be resolved on an issue-by-issue basis.

MAH has explained that the *Greenbelt Act* contemplates that the less environmentally protective plan will be brought up to the standard of the more environmentally protective plan, but this is not stated explicitly in the Act. Thus, it is possible that the reverse may occur in some circumstances and the provisions of one plan may be weakened by the application of another. This situation differs from the *Places to Grow Act*, which makes clear that where a conflict arises between a direction in a growth plan and a direction in a plan or policy such as the 2005 PPS, NEP or ORMCP with respect to a matter relating to the natural environment or human health, the direction that provides more protection to the natural environment or human health will prevail.

As with the *ORMCA*, the minister may propose and consult on amendments at any time. However, the *ORMCA* provided for the minister to set out circumstances in which a person or public body could apply for an amendment to the ORMCP. The *Greenbelt Act* does not include a similar provision, so there are no opportunities for individuals or public bodies to bring forward amendments to the area designated as Protected Countryside in the Greenbelt Plan.

Another significant difference between the *ORMCA* and the *Greenbelt Act* involves minister's zoning orders (MZOs) under the *Planning Act*. Both pieces of legislation permit the minister to continue making MZOs that do not necessarily need to conform to a municipality's official plan or the ORMCP or Greenbelt Plan. Under *ORMCA*, however, MZOs were required to have regard to the 1997 PPS under the language of the *Planning Act* as it then read. Under the *Greenbelt Act*, MZOs are not required to be consistent with the 2005 PPS.

As noted above, provisions in the *Greenbelt Act* permit the minister to instruct the OMB to defer consideration of a matter concerning the Greenbelt Area and instead appoint a hearing officer to conduct the hearing. This power reflects concern on the part of the public and some stakeholders that the OMB currently favours developers and does not always adequately consider provincial policy. The government has stated that it plans further reforms for the OMB that may be announced in the spring or summer of 2005.

The *Greenbelt Act* does not specify any other tribunal with which hearing officers who consider matters under the Act would be affiliated. This leaves open the question of whether individual hearing officers will be appointed on an *ad hoc* basis, or whether they will come from an existing tribunal. Some members of the public who commented on the proposed Act urged the government to appoint officers from the Environmental Review Tribunal to ensure that environmental aspects of these decisions are well understood and considered. Others advocated for the creation of a specialized Greenbelt Tribunal to hear and make recommendations on matters related to the Act.

The *Greenbelt Act* contains the potential to protect agricultural lands and environmentally sensitive areas in the Greater Golden Horseshoe from continued urban sprawl. However, the effectiveness of the Act is largely dependent on the details of the Greenbelt Plan, discussed below, and the eventual implementation of the Act and Plan.

Greenbelt Plan

Protection of the Natural Environment

The Natural System policies of the GBP offer enhanced protections for key natural features when compared to the natural heritage policies of the Provincial Policy Statement (PPS). However, as its multi-pronged vision confirms, the GBP does not set out to protect the natural environment above all else. This is why the GBP's repeated assertion that it offers "permanent protection" to natural heritage and water resource systems is problematic; it is more accurate to say that the GBP offers "enhanced" protection for natural features and functions.

But even these enhanced protections are not on par with the protections offered by the Niagara Escarpment Plan (NEP) and the Oak Ridges Moraine Conservation Plan (ORMCP). A comparison of the GBP's strongest policies for the protection of natural heritage features and functions with those contained in the NEP and the ORMCP underscores the fact that protection of the natural environment within the Protected Countryside is not as strong as it could be, nor is protection of key natural heritage features guaranteed under all circumstances (see Table 1).

Some experts criticize conservation strategies that focus on specific natural heritage features "rather than on protecting or curtailing land uses within specified areas." Identified as notable exceptions to this features-focused approach are the NEP and the ORMCP – both of which protect large blocks of land and restrict uses within these blocks of land. The problem with the features-focused approach, critics explain, is that there are always competing interests at play when natural heritage policies are applied as an overlay on areas where other land uses are also permitted. The GBP's Natural System functions as an overlay on top of identified land use designations. While the GBP does restrict land uses within large blocks of land, it does this through a land use designation system that is not driven by natural heritage protection and, likely because of this, permits more uses within its NHS than the ORMCP and NEP. This creates a planning system where unresolvable conflicts will potentially emerge.

Preservation of Agricultural Lands

The GBP contains strong policies designed to prevent protected agricultural lands from being consumed by urban settlement area expansions. The most significant of these policies is the restriction on the expansion of urban areas located *outside of* the Protected Countryside *into* the Protected Countryside. In this respect, the label 'Protected Countryside' is very appropriately applied to lands within the Protected Countryside. These protections represent significant enhancements over PPS policies which require that other reasonable alternatives be considered but, if no other options exist, permit the re-designation of prime agricultural lands for urban expansion purposes.

But some commenters argue the GBP does not go far enough to protect agricultural lands. They believe the lands located between the Greenbelt and the existing urban boundaries of municipalities within the Greater Golden Horseshoe should be included in the Greenbelt. Left unprotected, they fear this area of largely prime agricultural land will eventually be consumed by urban sprawl. Further, the availability of this land will effectively work against any growth management efforts. Some point to expert analyses indicating that, even if low-density development practices continue, most of the anticipated urban growth to 2031 can be accommodated on land already designated for urban uses. They conclude from this that if MAH was seriously committed to fighting further urban sprawl there is no reasonable justification for leaving these buffer lands out of the Greenbelt.

Concerns have also been raised about the potential for Greenbelt boundary amendments, both in the period leading up to and during the GBP's 10-year review, which might put the Greenbelt's agricultural lands at risk. The Greenbelt's boundaries are not immune to potential amendments, with the only stated restriction being that the total land area of the Greenbelt cannot be reduced through any amendments. Some fear an outward, 'rolling' migration of the Greenbelt as urban development pressures continue unabated. These fears are only exacerbated by the lack of a confirmed growth management strategy as of May 2005.

Conversely, strong concerns have also been raised about the establishment of the Greenbelt and the implications for land and housing prices. Development industry commenters argue that the establishment of firm boundaries will contribute to rising costs for land and subsequently, rising housing costs. Further, homebuilders argue that the current predominant practice of developing largely single-family homes on suburban lots is simply a response to the demands of the market.

Permitted Uses

While the GBP offers some enhanced protections for its NHS and agricultural lands beyond the protections provided by policies of the PPS, a variety of non-agricultural uses are permitted within the plan area. These "permitted uses" may lead to scenarios where competing interests - as described in the 'protection of natural heritage' section - emerge. The chart comparing GBP protections for natural areas to the protections offered by the NEP and the ORMCP highlights some of these competing interests within the Greenbelt.

The GBP does include policies requiring that enhanced mitigation, rehabilitation, and protection measures be taken with proposals for permitted, non-agricultural uses. However, there is no requirement that the protection of natural heritage features and functions or agricultural lands is placed above the need for certain permitted uses. Proposals for infrastructure provide a prime example of this dilemma of competing interests. Circumstances will emerge where a key natural feature will be threatened by an infrastructure proposal and, if the need for the infrastructure is demonstrated and there are deemed to be no other reasonable alternatives, then natural heritage could be impacted or sacrificed to allow for the infrastructure project to proceed. The only situation where an infrastructure project could not be built within a key natural feature is one where it is prohibited by other government regulations or standards.

TABLE 1
Comparative Analysis Land Use Policies and Designations in Most Stringently Protected Natural Area Categories in three land use plans (i.e. GBP, NEP and ORMCP)

Existing or Proposed Land Use	Greenbelt Plan Natural Heritage System	Niagara Escarpment Plan Escarpment Natural Area	Oak Ridges Moraine Conservation Plan Natural Core Areas
New mineral aggregate extraction operations	YES* (except in significant wetlands and woodlands, & significant habitat of endangered & threatened species)	NO	NO
Expansion of existing mineral aggregate extraction operations	YES*	YES* (only limited expansion of existing sandstone quarries permitted)	NO (not beyond boundary of area under license or permit)
Major recreational uses (ski hills, golf courses, serviced camp grounds)	YES*	NO (only low intensity recreational uses permitted)	NO (only low intensity recreational uses permitted)
New waste management facilities (landfills, incinerators, composting/ recycling centres)	YES*	NO	NO
Transportation infrastructure (public highways)	YES*	YES*	YES*
Human settlement area expansions	NO	NO	NO
Agricultural uses (existing and new)	YES*	YES* (existing operations permitted but no new operations allowed)	YES*
Water taking	YES*	YES*	YES*
Forest management (including wood harvesting)	YES*	YES*	YES*

* Where uses are permitted, these uses may be subject to requirements contained in each of the plans. Interested readers should consult each plan to learn about any requirements.

The GBP's definition of infrastructure also includes waste management systems, which could include landfills, incinerators, and other waste processing sites. If a proponent can argue the need and convince approval authorities that there are no other viable alternative locations, waste management facilities could be established in the NHS and, further, within key natural heritage features.

When new infrastructure is proposed within the Greenbelt, in addition to securing all necessary federal and provincial approvals, the GBP requires that the proposal satisfy one of two justifications. It must either support rural communities and activities permitted in the Protected Countryside or it must serve the "significant growth and economic development" anticipated in southern Ontario beyond the Greenbelt area by establishing infrastructure connections between existing growth centres and between these centres and the province's borders. These justifications are broad enough that they are likely to encompass most infrastructure proposals.

An additional policy, to be pursued "only where practicable," calls for the optimization of both existing infrastructure capacity and its coordination with different infrastructure services in order to "support and reinforce the rural and existing character of the Protected Countryside and the overall urban structure for southern Ontario established by the Greenbelt and any growth management initiatives." When compared to the justifications for new infrastructure set out above, this conveys a message that a lower priority has been set on maximization of existing infrastructure. Further, the GBP makes no mention and, therefore, includes no policies or recommendations to encourage alternative, more sustainable forms of infrastructure within the Protected Countryside.

Mineral aggregate operations are treated in a similar manner to infrastructure within the Protected Countryside. While there are some enhanced restrictions on the establishment of new quarrying operations, the expansion or establishment of these operations, even within the NHS, is permitted in most circumstances, subject to conditions. The huge challenge, as the aggregate industry itself recognizes, is that the locations of many of the key features that the GBP aims to protect – particularly features found within recharge areas – coincide with the location of prime stone, sand, and gravel deposits.

Plan Implementation

The government's commitment to establish the Greenbelt Council – an entity whose mandate will be to track progress of GBP implementation and identify any challenges in this process – is a positive move. However, many challenges remain unaddressed.

The GBP's implementation strategy places a large amount of responsibility on the shoulders of municipalities to identify and delineate key features and land types. But the province has not set out mandatory standard frameworks to be followed in making these designations and delineations and, in so doing, to ensure consistency in GBP implementation across municipalities. In some cases, frameworks exist and are recommended for use by municipalities and in other cases, no guidance appears to exist. Many stakeholders have contrasted this situation to the approach used for the implementation of the ORMCP, which is accompanied by detailed technical documents to guide plan implementation. MAH has indicated that the province will be providing mapping and/or criteria to municipalities in the Greenbelt for the delineation of natural features.

Tracking success of implementation will also prove to be a challenge, given the apparent lack of guidance at the municipal level. While the GBP includes mention of the development of monitoring parameters to track and evaluate success of implementation efforts, it is unclear who will collect the information, who will evaluate whether the GBP is on track based on that information, and how frequently such monitoring and reporting will be undertaken.

Public Participation & *EBR* Process

Background

Government efforts to consult with the broader public regarding the establishment of a protected greenbelt area began in December of 2003 with Bill 27 – *The Greenbelt Protection Act* – which secured the quick designation of a Greenbelt study area that could then be discussed in more detail. A notice of proposal for the Act appeared on the Environmental Registry on December 24, 2003, with a 30-day comment period and was reposted on January 21, 2004, in order to extend the comment period to March 23, thereby offering a total of 90 days for public input. The Act received Royal Assent on June 24, 2004. A decision notice has yet to be posted to the Environmental Registry as of May 2005.

In February of 2004, the provincial government announced the appointment of a Greenbelt Task Force. By May of 2004, MAH posted a notice of proposal for policy on the Environmental Registry announcing that the Task Force had prepared, and was seeking public input on, a discussion paper exploring issues associated with establishing a greenbelt. The notice explained that the Task Force was seeking the input of the broader public prior to making its final recommendations to the province and was providing a 60-day comment period. In addition, the notice announced that six public meetings would be held around the Greater Golden Horseshoe to hear the views of the public regarding the discussion document.

The Task Force issued a document in August of 2004 entitled "Toward a Golden Horseshoe Greenbelt – Greenbelt Task Force – Advice and Recommendations to the Minister of Municipal Affairs and Housing," which set out its final recommendations to the government. In that document, the Task Force reported that it heard from more than 1,200 people and received more than 1,000 submissions on its discussion document.

Very soon after the Task Force presented its recommendations, the government initiated public and stakeholder consultations on a draft GBP. These consultations took place over the fall and winter of 2004. The draft GBP and a related schedule of public meetings and information sessions were posted on the Environmental Registry on October 28, 2004. The public was given until December 12, 2004, to comment, but the comment period was extended to December 20, providing a total of 53 days for public comment. More than 3,500 people attended a total of eight meetings held in locations across the GGH. The draft GBP and associated maps were also made available at 14 Government Information Centres. Further, MAH reported that it had over 81,000 visits to its Greenbelt website, it received more than 1,100 written submissions and over 2,000 electronic surveys in response to the draft GBP. Unfortunately, public comments received via the Environmental Registry were not provided by MAH until early August 2005, thereby preventing the ECO from reviewing all submitted comments in the preparation of the Public Comments section below.

The draft *Greenbelt Act* was posted to the Environmental Registry for public comment on October 28, 2004, for a 30-day comment period ending on November 27, 2004. The proposed Act was referred to the Standing Committee on General Government, which held public hearings from January 31 to February 3, 2005. Public input resulted in the committee proposing changes to the Act. On February 24, 2005, the *Greenbelt Act* received Royal Assent. The final version of the GBP was released on February 28, 2005. Public comments on the Greenbelt Act received via the Environmental Registry were not provided by MAH until July 4, 2005, thereby preventing the ECO from reviewing all submitted comments in the preparation of the Public Comments section below. Further, as of August 2005, a decision notice had not been posted on the Environmental Registry for either the *Greenbelt Act* or the GBP.

Public Comments

A diverse mix of stakeholders provided feedback on the proposed *Greenbelt Act* and GBP. They included municipalities, government commissions, environmental non-governmental organizations, agricultural organizations, developers, and representatives from the aggregate industry. The stakeholder input highlighted below was obtained by the ECO as a result of stakeholders directly submitting their comments to the ECO and through review of transcripts from Standing Committee on General Government consultation sessions on the Greenbelt Plan and *Greenbelt Act*. Some key issues that were raised and MAH responses are documented below.

Need for Appellate Tribunal
Stakeholders from all sectors called for the government to establish or identify an appellate tribunal to hear any appeals related to GBP implementation. Some suggested that the existing Environmental Review Tribunal was the most appropriate entity to take on this role. Others, while they did not identify the body most suited to take on this task, pointed to the fact that the Greenbelt Task Force identified the need for an appellate tribunal, and warned that the responsibility should not fall to the Ontario Municipal Board to decide how to resolve disputes about the GBP. In its final decision on the Act and GBP, the province chose not to establish or identify an appellate tribunal with the necessary expertise to hear any challenges to GBP implementation. As explained in the implications section above, this has generated concern that the OMB will likely become the arena where some controversial aspects of GBP implementation will be decided.

Greater Provincial Role in Plan Implementation
A number of stakeholders, including municipalities, environmental non-governmental organizations, and private sector representatives, called for the province to play a more direct role in GBP implementation at the local level. A host of concerns were raised about making municipalities responsible for land use designations. Some pointed to the potential for inconsistencies in designations from one municipality to another. Others pointed to the lack of technical guidance from the province regarding the identification and appropriate categorization of various land types and features and called for comprehensive, consistent and defensible guidelines. Still others pointed to the lack of resources at the municipal level to do this work, recommending that the province should provide resources to municipalities to enable them to engage in effective GBP implementation. Finally, commenters from the development industry raised concerns that provincial involvement in regional planning adds an additional layer of bureaucracy, contributing to overregulation.

Several stakeholders suggested that the implementation method being used for the Oak Ridges Moraine Conservation Plan provides an appropriate model for the provincial role in GBP implementation. Reference was also made to the detailed technical implementation documents prepared as part of the ORMCP process, and it was recommended that similar documents be prepared for GBP implementation.

The final GBP does not include any changes that address any of the concerns raised by stakeholders regarding the province's role in GBP implementation.

Protection of Natural Heritage
Most commenters recommended that GBP policies for the protection of natural heritage be strengthened. Many felt that the stronger protection policies that apply within the Greenbelt's NHS should apply throughout the Protected Countryside. Some wanted the GBP's policies to be as strong as the protection policies found in the Oak Ridges Moraine Conservation Plan. Still others urged the government to exclude all non-agricultural uses — including uses such as quarrying and infrastructure projects - from key natural heritage features. Some also recommended that no renewable resource activities should be permitted in key features. MAH did not make any changes.

Protection of Agricultural Lands
Many commenters related their concerns about the protection of agricultural lands directly to their concerns about Greenbelt boundary amendments. Most were supportive of the proposed mandatory GBP review every 10 years, with the consideration of settlement area boundary expansion occurring only at

that point in time. But it was recommended that any such expansions should not be allowed into prime agricultural land. Private sector representatives felt that 10 years between reviews was too long and a five-year review cycle would be more appropriate.

Others expressed concern that, via the minister's discretion to amend the GBP in the periods between the mandatory 10-year review, boundary changes might occur that lead to loss of agricultural land. One commenter suggested that a 'rolling' rather than a permanent Greenbelt has been established, as GBP amendments and reviews allow its boundaries to be shifted away from the GGH.

Finally, development industry representatives raised concerns about the restriction of land supply, arguing that this approach contributes to increasing land costs thereby contributing to increasing housing costs. Further, developers argue that a majority of Ontarians want to be able to purchase single family homes and are willing to move further away from urban centres in order to be able to afford to purchase such homes.

Response of the Agricultural Community
Commenters from the agricultural community sent a consistent message that protection of agricultural lands is not enough to ensure that agricultural activities in the Greater Golden Horseshoe area remain viable. Some commenters urged the government to take measures to enhance the economic viability of agriculture by including consideration of market prices and the infrastructure necessary for agriculture. Others demanded compensation from the government for locking Greenbelt lands into agricultural designations, thereby preventing them from selling their land to developers for future urban uses.

Prior to finalization of the *Greenbelt Act* and Plan, the province took some steps to address concerns around agricultural viability in Ontario. On the advice of the Greenbelt Task Force, the Ministry of Agriculture and Food announced the establishment of an Agricultural Advisory Team in June of 2004 to provide advice to the government on issues related to agricultural viability in the province. In October of 2004, the team released its recommendations, which include calling for the province to strengthen the *Farming and Food Production Protection Act* and to impose firm urban boundaries to protect agricultural lands. As of May 2005, the province has yet to announce any plans in response to the Agricultural Advisory Team's recommendations. The province, through MAH, has also developed a Strong Rural Communities Plan but this plan does not address the issue of agricultural viability.

Non-Agricultural (Permitted) Uses
The GBP's infrastructure policies generated a great deal of response from a variety of stakeholders including citizens-at-large, environmental groups, and municipalities. Many commenters called on MAH to put stronger restrictions in place to prevent infrastructure from impacting on or being located within key natural heritage features. Some called for a restriction on all non-agricultural uses in natural heritage features. Others wanted to see certain types of infrastructure banned from the Protected Countryside. Specific mention was made of waste management facilities, with the recommendation that, aside from composting facilities, no other waste management facilities should be allowed in the Protected Countryside. Concerns were also raised about major recreational facilities with some commenters suggesting these facilities should only be permitted on rural lands while others suggested that only minor recreational facilities are appropriate within the Protected Countryside.

Questions were raised about the GBP's requirements for the justification of infrastructure projects. One stakeholder requested that the government clearly define what constitutes 'essential' infrastructure. Some stakeholders recommended that a more holistic, environmentally sensitive approach be embraced for the evaluation of infrastructure proposals within the Protected Countryside. MAH did not respond to these comments on non-agricultural permitted uses.

Concerns were also raised about GBP policies for mineral aggregate operations. Some commenters called for a ban on aggregate operations within the Greenbelt's NHS. Further, it was recommended that the industry should have to establish the need for the aggregate prior to expanding an existing aggregate operation or establishing a new one within the Protected Countryside. Aggregate industry representatives argued that current environmental protections contained in the policies of the PPS and the *Aggregate Resources Act* provide adequate protection of natural heritage and that the stronger policies within the Protected Countryside are not necessary. MAH did not make any changes to the GBP to address these concerns.

Establishment of Greenbelt Council

Many commenters urged the province to make the establishment of a Greenbelt Council a mandatory requirement within the *Greenbelt Act* and Plan. Government responded by confirming through the Act and Plan that a Greenbelt Council will be established.

Powers of Municipalities

Several commenters expressed concern about the limitation on a municipality's ability to impose stricter requirements within the Protected Countryside where aggregate and agriculture are concerned. One municipality commented that it had spent a great deal of time working with the community and the private sector to develop effective local policies relating to the aggregate industry. The GBP's policies will override these local policy efforts where local policies are stricter. The final GBP was not changed to address this concern.

Questioning Some Fundamentals

In addition to the comments outlined already, many stakeholders raised some fundamental concerns about the underlying approach of the *Greenbelt Act* and Plan, along with other associated government efforts to reinforce Greenbelt goals by managing growth. The Niagara Escarpment Commission recommended that limits on growth must become part of the public dialogue when discussing these various planning initiatives. Others called for more holistic evaluations of undertakings such as infrastructure and aggregate operations that threaten Greenbelt features, challenging status quo justifications used for the need for these undertakings. In contrast, others argued for the need to assess the economic cost of the Greenbelt by looking at lost land values, increasing costs for housing, and impacts on infrastructure costs.

SEV

As of August 2005, the ECO has yet to receive MAH comments regarding how the SEV was considered within the context of these decisions.

Other Information

Places to Grow Act and Draft Growth Plan for the Greater Golden Horseshoe

The *Places to Grow Act* provides the province with the legal and policy framework required to prepare growth plans for any area of Ontario, and to amend these plans as required. The Act and its first growth plan - the Draft Growth Plan for the Greater Golden Horseshoe - are deemed to be critical to the success of the *Greenbelt Act* and Greenbelt Plan. This is because the goal of preserving outlying natural, rural, and agricultural lands is inextricably linked to the need to formulate and implement plans to direct, control and transform the nature of urban growth in southern Ontario.

Details of how growth management will be pursued in the Greater Golden Horseshoe (GGH) are set out in the Draft Greater Golden Horseshoe Growth Plan. The plan is guided by the province's desire to plan and manage growth in a manner that supports a strong and competitive economy, protects the natural environment and agricultural lands, optimizes the use of existing and new infrastructure, and enhances quality of life in communities throughout the GGH. These goals will be achieved through the promotion of intensification and re-urbanization, including brownfield redevelopment, wherever possible.

The plan establishes overarching growth management policies and goals that will be implemented via five sub-area growth management plans to be developed cooperatively by the province and the municipalities. While there will be flexibility for municipalities to meet specific local needs through sub-area plans, they will also be required to conform to the higher level requirements of the provincial growth plan, including the following key policy directions and goals:

- Direct growth to built up areas within the GGH by establishing urban growth centres and intensification corridors.
- Establish development intensification targets within built-up areas (the proposed goal is not less than 200 residents and jobs per hectare).
- Establish residential and employment density requirements within areas designated for future growth in order to support public transit and promote mixed use development (the proposed goal is not less than 50 residents and jobs per hectare within GGH growth centres).
- Establish the requirement that a sub-area growth strategy – including plans for intensification – must be completed prior to a municipality considering any urban boundary expansions.
- Make transit the first priority for infrastructure investment.

ECO Comment

The *Greenbelt Act* and Plan offer some enhanced protections for natural features and functions and considerable new protection to southern Ontario's agricultural lands. The ECO commends the government for acting quickly to develop and implement the Act and Plan. In addition the ECO acknowledges the contributions of the members of the Greenbelt Task Force, staff from other provincial ministries, municipal governments, and the wide array of public commenters who participated in this process. The ECO is pleased that the public was provided with a longer period of time to comment on the GBP than was the case with the ORMCP, however, even more time would have been appropriate given the significance of the proposal. It would also have been appropriate to offer a similar amount of time for the public to comment on the Act, rather than the 30-day period that was provided.

The ECO agrees with those stakeholders who contend that the policies designed to protect the Protected Countryside's natural features and functions, while stronger than the protections offered in the Provincial Policy Statement, are not as strong as is desirable within a greenbelt area. The ECO believes that the GBP's natural heritage protection policies should be at least as strong as the protections offered by the ORMCP and the NEP. Introducing consistency across these plans would also eliminate the complexities and confusion that are bound to arise when multiple plans with differing policies apply to lands in such close proximity to each other.

The ECO also shares the strong concerns of many commenters regarding uses that the GBP permits across the Protected Countryside and, in some cases, near or within key natural features. The ECO believes no non-agricultural uses should be permitted within key natural heritage features or the buffer zones around them. In addition, the ECO believes that the GBP's Natural Heritage System policies should apply, with minor appropriate adjustments, throughout the Protected Countryside in order to ensure the protection of all key natural features and eliminate the potential for problematic competing interests to emerge.

With respect to permitted uses, the ECO is particularly concerned about the potential for clashes between the GBP's goal to protect natural features and its accommodation of both infrastructure development and the establishment and expansion of mineral aggregate operations. The ECO suggests that all key natural heritage features should be protected from newly established or expanding aggregate operations. The potential for key features to be threatened by aggregate extraction underscores the need to conserve, recycle and search out viable substitutes for new aggregate material. Further, this fundamental weakness of the GBP could well lead to infrastructure that generates additional growth pressures on the Protected Countryside in the form of leapfrog development. Therefore, steps need to be taken in the near future to tackle these fundamental questions and concerns.

While the ECO applauds the GBP's strong policies aimed at preventing the expansion of urban communities into the Protected Countryside, the ECO shares the concern of commenters who feel that settlement areas located within the Protected Countryside should not be able to expand into prime agricultural land.

The agricultural community has indicated that protecting agricultural land is only one part of the effort required to ensure the viability of farming in southern Ontario. The ECO concurs with this view and encourages the government to pursue the development of a much-needed sustainable agriculture strategy. Promoting the production of local food close to GGH markets contributes to environmental sustainability. Moreover, the Niagara Region's tender fruit lands are unique and deserve special protection in perpetuity so that future generations can benefit from consumption of peaches, grapes and other tender fruit grown in Ontario. The ECO commends the Ministry of Agriculture and Food for establishing an Agricultural Advisory Team and encourages the government to continue with this effort to explore and promote farming viability.

The ECO commends the government for committing to establish a Greenbelt Council to monitor and evaluate the success of GBP implementation. However, the ECO believes that, for the sake of consistency across the Protected Countryside, there is a need for the province to assume a larger role in GBP implementation. Municipalities and other agencies who will play a part in GBP implementation should be given clear guidelines and direction, as was done for ORMCP implementation. Provincial resources in the form of staff expertise and funding would also help.

The GBP also makes reference to the establishment of a monitoring framework and performance measures to gauge success, over time, in realizing GBP implementation. While the ECO strongly supports this approach, the GBP is unclear regarding timelines for development and implementation of such a system, overall responsibility for system oversight, and definite timelines for reporting out on the results of monitoring efforts. Further, the GBP is unclear regarding any system of accountability within the monitoring framework. The ECO urges MAH to assume a lead role in this effort by clarifying these details and promptly initiating efforts to develop the monitoring framework and associated performance measures.

The ECO shares the belief that the key to the success of the Greenbelt will be the implementation of a strong growth management plan for the Greater Golden Horseshoe area. The ECO is pleased that the *Places to Grow Act* received royal assent in June of 2005 and urges the province to move quickly to finalize and implement the associated growth management plan for the GGH area, in order to ensure that there are strong tools in place to manage urban growth.

The GBP represents an important step in efforts to reintroduce some balance into land use practices in southern Ontario. However, the ECO believes the province needs to continue to work towards tackling some of the fundamental issues that have yet to be addressed. Several commenters pointed to the need to engage the public in dialogue about limits to growth. The GBP and growth management initiatives all operate on the assumption that growth of the communities of the Greater Golden Horseshoe area is inevitable and desirable from an economic point of view. The ECO supports the view that there is a need to debate and discuss the fundamental presumptions around this growth model and to consider issues like sustainability, ecological footprint, and limits to growth.

The ECO will continue to monitor the implementation of the *Greenbelt Act* and Plan in future reports. In addition, the ECO will continue to track government efforts to develop and implement growth management strategies for southern Ontario.

Review of Posted Decision:
Provincial Policy Statement

Decision Information:

Registry Number: PF04E0004	Comment Period: 89 days
Proposal Posted: June 3, 2004	Number of Comments: 31
Decision Posted: February 21, 2005	Decision Implemented: March 1, 2005

Description

The Provincial Policy Statement (PPS) is a key component of Ontario's land use planning system. It provides direction on matters of provincial interest related to land use planning and development, and guides the provincial "policy-led" planning system. The Ministry of Municipal Affairs and Housing (MAH) has the authority to issue such policy statements under the *Planning Act*.

The stated intent of the PPS is to provide for appropriate development while protecting resources of provincial interest, public health and safety, and the quality of the natural environment. The PPS applies to any land use planning undertaken by a council of a municipality, a local board, a planning board, a minister of the Crown and a ministry, board, and a commission or agency of the Ontario government.

The *Planning Act* requires that MAH review the PPS within five years of it being issued. The current review began in May of 2001, examining potential changes to the version of the PPS that was introduced in 1996 and later amended in 1997. The PPS review initially was commenced as part of MAH's "Smart Growth" initiative. The ministry took almost four years to complete this review, releasing the new PPS in the February of 2005. The new PPS came into effect on March 1, 2005 and it applies to all applications, matters or proceedings that are commenced after this date.

The *Strong Communities (Planning Amendment) Act, 2004* (Bill 26) was introduced on December 15, 2003, and received Royal Assent on November 30, 2004. Among other things, it amended the *Planning Act* to require that decisions and advice regarding planning matters "shall be consistent with" the PPS. According to the ministry, this is a stronger standard than the former "have regard to" provision of the *Planning Act*. This standard was proclaimed at a later date to coincide with the approval of the new PPS.

The finalized 2005 PPS was part of the ministry's current "Planning Reform" initiative. This sweeping set of changes to Ontario's planning system includes additional proposed changes to the *Planning Act* beyond those of Bill 26 and potential reforms to the Ontario Municipal Board (OMB). As of April 2005, MAH had not reached a decision on these two additional reforms. The review of the PPS also was strongly tied to the introduction of the *Greenbelt Act* (Bill 135), as well as the *Places to Grow Act* (Bill 136).

These reforms were initiated in part because of concerns that the existing planning system was not effectively addressing issues such as continued urban sprawl, growing congestion on roads and highways, inefficient infrastructure investments, loss of green space and resources, and environmental degradation. According to the ministry, these initiatives "will provide an overall planning framework for Ontario that will help to create strong, sustainable communities, a strong economy, and will help to protect our environment and resources." These policy changes also are intended to achieve several government commitments, including to refine the planning system; to define an urban and natural structure and align infrastructure; and, to provide a stronger "green" focus.

Municipal official plans are the primary means of implementing many of these planning reforms, including those involving the PPS. The PPS states that municipalities "shall" identify provincial interests in establishing land use designation and municipal policies. Municipalities also "should" coordinate cross-boundary issues that involve other planning authorities. The PPS states that municipalities "shall" keep their official plans up-to-date and they are "encouraged" to develop indicators to monitor its implementation. According to the ministry, the PPS includes a number of elements that are intended to facilitate local implementation, specifically:

- the range of policies and geographic scales to which policies apply;
- the type of language in the policies;
- the minimum standards provided by the policies;
- the predominant focus of the policies on desired outcomes; and,
- the role of municipalities in establishing targets (e.g., affordable housing) and standards (e.g., density, population and employment).

MAH asserts that the PPS is more than a set of individual policies. It is intended that decision-makers use it in its entirety and not view the topic areas as isolated from one another. The ministry also clearly states that there is "no implied priority" in the order in which the topic areas appear within the PPS.

The PPS represents "minimum standards" for planning authorities. It does not prevent decision-makers from exceeding specific parts of the PPS, unless it would result in a conflict with other components of the policy. However, "provincial plans" – such as the Niagara Escarpment Plan, the Oak Ridges Moraine Conservation Plan, and the Greenbelt Plan – take precedence over the PPS to the extent of any conflict. Land use approvals that involve infrastructure, such as sewage systems or transportation corridors, may also require approval under other legislation, including the *Ontario Water Resources Act* and the *Environmental Assessment Act*.

The PPS is divided into three main sections: building strong communities; wise use and management of resources; and, protecting public health and safety. Other sections of the PPS also address its legislative authority, interpretation, implementation, and it also contains a lengthy section for definitions. This new version of the PPS generally follows the same structure and format as the previous 1997 version. (Interested readers should refer directly to the PPS itself for a full description of all the sections. The PPS is available online at MAH's internet site.)

The "building strong communities" section of the PPS covers a wide range of planning issues. Planning requirements are detailed for everything from residential housing to roads to airports. The purpose of this section is to variously encourage or require planning authorities to:

- "promote efficient development and land use patterns which sustain the financial well-being of the Province and municipalities over the long term;
- accommodate an appropriate range and mix of residential, employment (including industrial, commercial and institutional uses), recreational and open space uses to meet long-term needs;
- avoid development and land use patterns which may cause environmental or public health and safety concerns;
- avoid development and land use patterns that would prevent the efficient expansion of settlement areas in those areas which are adjacent or close to settlement areas;
- promote cost-effective development standards to minimize land consumption and servicing costs;
- improve accessibility for persons with disabilities and the elderly by removing and/or prevent land use barriers which restrict their full participation in society; and,
- ensure that necessary infrastructure and public service facilities are or will be available to meet current and projected needs."

The "wise use and management of resources" section of the PPS addresses natural heritage, water, agriculture, minerals and petroleum, mineral aggregate resources, and cultural heritage and archaeology. This section provides both directives and restrictions that planning authorities must consider with respect to these resources, as well as in the context of the other sections of the PPS.

The "protecting public health and safety" section of the PPS focuses on natural and human-made hazards. This section primarily addresses issues involving development and site alteration to mitigate flooding, erosion and other risks that may affect planning.

According to MAH, there are several important improvements to the PPS as a result of the revisions. Brownfields - former industrial or commercial properties that may be underutilized because of actual or perceived contamination - are now explicitly recognized and their redevelopment is encouraged. Coupled with targets for intensification and minimum densities, the ministry expects that the result will be increased tax assessments for municipalities and the saving of municipal funds by making better use of existing infrastructure.

Other key features of the 2005 PPS include a new emphasis on intensification and minimum densities. MAH expects this new emphasis will encourage denser development patterns in areas well-served by transit. The 2005 PPS also will lead to an increased mix of housing and employment, which can reduce the need for travel and create less traffic congestion. MAH says that these planning components are linked with the PPS's new provisions that support energy and air quality initiatives by municipalities. The PPS also now recognizes the role of alternative and renewable energy, and states that they shall be permitted in settlement areas, rural areas and prime agricultural areas.

Implications of the Decision

No definition of "shall be consistent with"

The PPS does not contain any definition of "shall be consistent with," nor does the recently amended *Planning Act*. The courts have consistently ruled that if terminology is not explicitly defined in legislation or policy that the common meaning of the term or phrase should be used. MAH asserts that the new wording is in fact a higher standard than the former "have regard to" provision in the *Planning Act* and that planning authorities "must achieve the outcomes of the PPS." According to information that MAH has provided to municipalities, common dictionary definitions of the term include:

- marked by agreement and concord;
- coexisting and showing no noteworthy opposing, conflicting or contradictory quality or trends;
- in harmony with;
- compatible with;
- constant to the same principle as; and,
- not contradictory with.

However, the ministry does admit that the "Ontario Municipal Board and planning decisions will help us understand the application of the standard" and that ultimately the most important interpretations of the phrase will be provided by the courts. Given that this one phrase has enormous bearing on application of the PPS in its entirety, in addition to the historical controversy of such provisions, the ECO believes that MAH should have explicitly defined "shall be consistent with" in both the *Planning Act* and the PPS to provide greater clarity for decision-makers and the courts.

Interpretation of language (e.g., shall, should, encourage, etc.)

The PPS uses various forms of language to denote the degree to which planning authorities are or are not required to implement its sections. The ministry states that some parts of the PPS are expressed as positive or required directions by means of "shall." For example, the PPS states that "mineral aggregate resources *shall* be protected for long-term use." Other policies set out limitations and prohibitions by using "shall not." For example, the PPS states that "demonstration of the need for mineral aggregate resources… *shall not* be required." Enabling or supportive language, that could be interpreted as being completely discretionary, includes "should," "promote," "may permit," "consider," and "encourage." For example, the PPS states that "the conservation of mineral aggregate resources *should* be promoted." The Ontario Municipal Board and the courts will no doubt struggle with the implications of these terms.

Problematic definitions

The PPS defines many of the terms that it uses and these definitions are of crucial importance in determining the application of the various policies. Some definitions contain wording and terminology that diverge from their common meanings. Any terms or phrases that MAH has specifically defined are highlighted in italics within the PPS (but not in this review). The ECO has concerns with many of the definitions and, by extension, the application of certain sections of the PPS. The ECO expects that the courts and the Ontario Municipal Board will be required to provide further definition and clarification on some of the terms used in the PPS, including both those that are defined and those that are not.

Many of these definitions are also cross-referenced to one another. For example, if the reader is interested in what is considered to be a "significant woodland," then first he or she must review the PPS definition of "woodland." While the former definition is arguably sound from an ecological perspective, the latter definition is problematic, because a significant woodland cannot be identified without it first being identified as a woodland. The PPS defines, in part, a woodland as being "treed areas that provide both environmental and economic benefit to both the private landowner and the general public." This suggests that if a private landowner with trees on their property does not recognize their economic benefit and the property is not zoned for conservation, then a planning authority cannot declare them to be a woodland nor a significant woodland.

In other instances, the PPS does not provide definitions for certain key terms that are critical for the purposes of interpretation and implementation. For example, the PPS states, "When planning for corridors and rights-of-way for significant transportation and infrastructure facilities, consideration will be given to the significant resources in Section 2." However, the PPS does not define what constitutes "significant transportation" facilities and it begs the question as to whether planning for an insignificant transportation corridor does not have to consider the aforementioned section of the PPS. The ECO believes that such ambiguities will lead to confusion on the part of other government ministries, planning authorities, and the public at large.

What is "development"?

How "development" is defined has implications for almost every section of the PPS. The 2005 PPS, in part, defines development as "the creation of a new lot, a change in land use, or the construction of buildings and structures, requiring approval under the *Planning Act*." For example, development is not permitted in significant coastal wetlands and it shall be restricted near sensitive surface or ground water features. Further, mineral aggregate operations, mining operations, and petroleum resource operations "shall be protected from development."

However, the 2005 PPS goes on to state that development specifically excludes activities that create or maintain infrastructure authorized under an environmental assessment process; works subject to the *Drainage Act*; or the mining of minerals or advanced exploration on mining lands in certain areas with respect to some of the natural heritage provisions of the PPS. For example, "infrastructure" is considered to be sewage and water systems, septage treatment systems, waste management systems, electric power generation and transmission, communications and telecommunications, transit and transportation corridors and facilities, oil and gas pipelines and associated facilities.

Similarly, mineral aggregate operations are not considered to be a form of development or site alteration in the PPS. This is confirmed by the requirement within the PPS that mineral aggregate operations "shall be protected from development." As such, none of the restrictions protecting natural heritage features, such as significant wetlands or significant woodlands, apply. Clearly, a broad array of activities that would normally be understood as constituting development in a common sense or lay definition of the term are, in fact, not considered to be development for the purposes of the PPS.

What are "no negative impacts"?

The PPS states that development and site alteration shall not be permitted in some natural heritage features, such as significant woodlands south and east of the Canadian Shield, unless it has been demonstrated that there will be "no negative impacts" on the natural features or their ecological functions. Negative impacts are, with respect to natural heritage features, "degradation that threatens the health and integrity of the natural features or ecological functions for which an area is identified due to single, multiple or successive development or site alteration activities."

Planning authorities, typically the municipalities themselves, are left to determine the exact criteria by which to assess "negative impacts." These assessments of development applications are usually called Environmental Impact Statements (EIS) and are typically prepared by private consultants. Concern has been raised that this process "by its very nature, is confrontational rather than delivering purely scientific findings" often resulting in the municipality or the Ontario Municipal Board acting as arbiter. In other cases, these assessments lack detail and seem to be of questionable value. At a minimum, MAH should develop guidelines that detail the requirements of an Environmental Impact Statement.

Lack of comprehensive planning targets

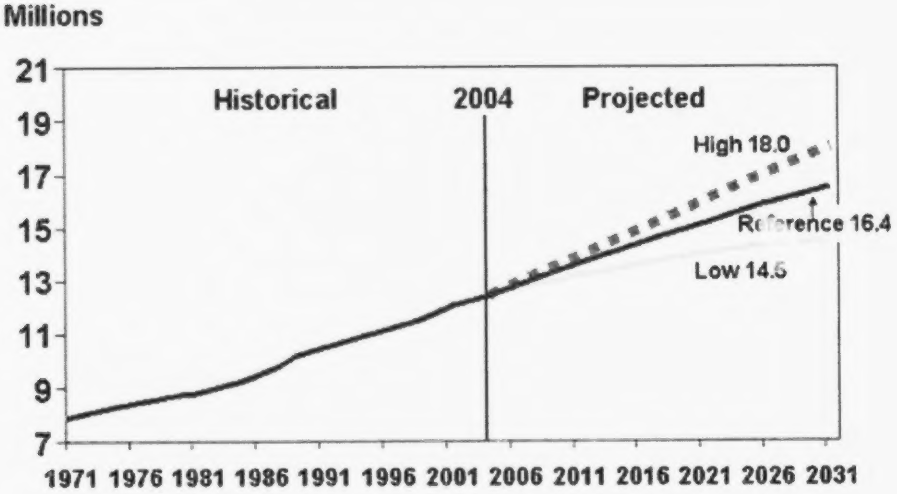
Planning authorities are not specifically required to establish planning targets, with the exception of new targets for residential growth, serviceable land, and affordable housing. However, the PPS does encourage municipalities "to establish performance indicators to monitor the implementation of the policies in their official plans." The incorporation of quantifiable targets into official plans is recognized by experts as a progressive approach to planning, facilitating both policy and program evaluation by planning authorities. For example, official plans that contain measurable goals for the protection of natural heritage features provide for increased accountability, as well as greater probability of achieving desired outcomes.

The PPS states that MAH will identify performance indicators for measuring the effectiveness of some or all of the policies. However, as one member of the public noted, the 1997 PPS had a similar stipulation, and "even now, some eight years later, no draft performance indicators have been released for public review." The ECO believes that MAH should begin this consultation in a timely manner, well in advance of the next scheduled review of the PPS and make effective use of the Environmental Registry.

Assumptions of and requirements for population growth

The PPS operates on the assumption that the population size of communities will increase. The PPS does encourage intensification and redevelopment, in addition to limiting the consideration of the expansion or creation of new settlement areas to only during the time of comprehensive municipal plan review. However, the underlying assumption of the PPS – in tandem with "growth plans" under the proposed *Places to Grow Act* – is that Ontario's population should increase and that that is a sound policy choice. The issue of future population growth is an enormously significant public policy choice that has received little debate.

Population Projections, Ontario

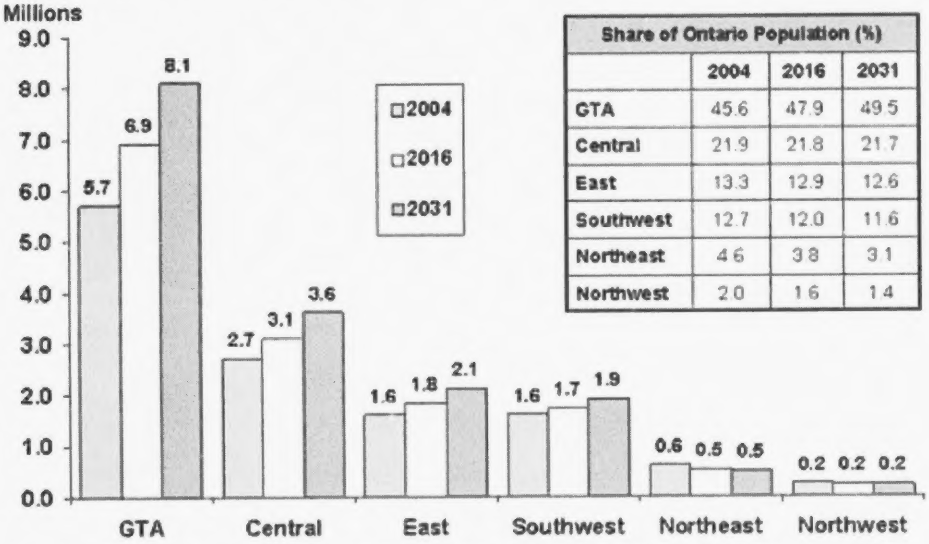


Sources: Statistics Canada, 1971-2004, and Ontario Ministry of Finance projections.

To meet the needs of current and future residents, the PPS states that "planning authorities shall… maintain at all times the ability to accommodate residential growth for a minimum of 10 years" and "land with servicing capacity sufficient to provide at least a 3 year supply of residential units." Further, the PPS directs that "sufficient land shall be made available… to accommodate an appropriate range and mix of employment opportunities, housing and other land uses to meet projected needs for a time horizon of up to 20 years." According to MAH, this capacity will be based on population growth numbers that are established by upper-tier municipalities. In turn, the upper-tier municipalities generate their numbers based on population modelling done by the Ontario government.

The Ministry of Finance (MOF) produces detailed population projections for Ontario for the 30-year period following every national census. Statistics Canada conducts national censuses every five years. MOF states that "these population projections do not represent Ontario Government policy targets or desired population outcomes; nor do they incorporate explicit economic assumptions. The projections are developed to provide to Ontario ministries, municipalities and other interested users an outlook of population growth for Ontario…. The Ministry's demographic assumptions for growth reflect past trends in all streams of migration and the continuing evolution of long-term fertility and mortality patterns."

Projected Population, Ontario Regions 2004, 2016 and 2031



Share of Ontario Population (%)			
	2004	2016	2031
GTA	45.6	47.9	49.5
Central	21.9	21.8	21.7
East	13.3	12.9	12.6
Southwest	12.7	12.0	11.6
Northeast	4.6	3.8	3.1
Northwest	2.0	1.6	1.4

Sources: Statistics Canada, 2004, and Ontario Ministry of Finance projections (Reference scenario).

While MOF may take the position that their population models do not constitute policy targets, they are in fact being used as such by other ministries and, by extension, municipalities. The PPS has clearly been designed to incorporate the assumptions and expectations of these population models. More importantly, the PPS obligates individual municipalities to plan for this growth without giving them the ability to develop plans based on minimal or no growth options. For example, it is not by coincidence that Bill 136 is entitled the *Places to Grow Act*. To a degree, this issue does go beyond the powers of the Ontario government as it is the federal government that regulates immigration to Canada.

The fallacy to this approach to planning is that the more the Ministry of Finance predicts certain regions in Ontario will grow in population size, the more municipalities are forced to plan for these increases without being able to decisively set limits to growth. Further, under the *Places to Grow Act*, MPIR's growth plans are binding and municipalities may not appeal them. These policy-driven growth pressures do make the Greenbelt Plan all that more important as settlement areas outside the Greenbelt are not permitted to expand into it, unless its boundaries are altered during a 10-year review.

This begs the over-all question as to what degree can certain regions in Ontario, such as southern Ontario, sustain and assimilate this relatively unchecked growth. Unchecked growth not only affects a myriad of environmental issues, but also shapes the very character of Ontario. Moreover, many areas with infrastructure in northern and rural Ontario are in fact experiencing depopulation. The ECO also notes that neither the Ministry of Finance nor the Ministry of Public Infrastructure and Renewal are prescribed ministries under the *EBR* despite the fact they clearly have environmentally significant roles to play in Ontario's land use planning system.

Proactive versus reactive planning in the PPS
The PPS obligates planning authorities to actively plan for components such as residential growth, serviceable land, redevelopment, and intensification. Planning authorities also "shall promote economic

development and competitiveness" by ensuring a range of employment, providing opportunities for a diversified economic base, protecting employment areas for current and future uses, and ensuring the necessary infrastructure for current and projected needs. The PPS also directs municipalities that "as much of the mineral aggregate resources as is realistically possible shall be made available as close to markets as possible" without even requiring the demonstration of need.

The PPS takes the approach that such issues should be planned for up-front and that municipalities often must develop supporting policies to ensure that specified targets are met. However, the PPS takes a selective approach for such up-front requirements for identification and planning. Not only does the PPS not require a municipality to identify natural heritage features, unless they are necessary for the hydrological integrity of the watershed, but it does not obligate a municipality to plan for the creation of a *natural heritage system*. Further, with the exception of speciality crop areas, municipalities are not required to identify prime agricultural lands. In both examples, the PPS does not specify or encourage municipalities to develop supporting policies even though it constitutes sound planning.

Primacy of other legislation: Aggregate Resources Act
The *Aggregate Resources Act* (*ARA*) takes primacy over the PPS. This legislation underscores this point by stating that, "This Act, the regulations and the provisions of licences and site plans apply despite any municipal by-law, official plan or development agreement and, to the extent that a municipal by-law, official plan or development agreement deals with the same subject-matter as this Act, the regulations or the provisions of a licence or site plan, the by-law, official plan or development agreement is inoperative."

The *ARA* also clearly states that the Minister of Natural Resources or the Ontario Municipal Board, in considering whether an aggregate licence should be issued or refused, need only "have regard to" the effect of the operation of the pit or quarry on such things as the environment, on ground and surface water resources, agricultural resources, or on any other planning and land use considerations. Therefore, the 2005 PPS is not likely to spur any change to official plans in this respect, because the *ARA* has virtually no prohibitions on where or how to locate aggregate pits. The Act only specifically prohibits aggregate operations within 200 metres of the natural edge of the Niagara escarpment.

Primacy of other legislation: Farming And Food Production Protection Act
The *Farming And Food Production Protection Act* (*FFPPA*) takes primacy over the PPS. According to OMAF, a central purpose of this legislation is to ensure that municipalities are prevented from enacting by-laws that would restrict a normal farm practice carried on as part of an agricultural operation. This primacy has been reflected in numerous provisions of the PPS, including that in prime agricultural areas "all types, sizes and intensities of agricultural uses and normal farm practices shall be promoted and protected in accordance with provincial standards." Further, the PPS specifically states that nothing in its natural heritage provisions "is intended to limit the ability of existing agricultural uses to continue."

Primacy of other legislation: Endangered Species Act
The PPS states that "development and site alteration shall not be permitted" in the "significant habitat of endangered species and threatened species." However, as the PPS does not prohibit other types of activities from occurring – such as infrastructure or aggregate operations – one might be led to believe that these are permissible. This is not the case.

Ontario's *Endangered Species Act* (*ESA*) states that no person shall wilfully "destroy or interfere with or attempt to destroy or interfere with the habitat" of any regulated endangered species. This legislation, which takes primacy over the PPS, does not make exceptions. MAH should have made this prohibition abundantly clear to avoid any possible confusion on the part of planning authorities or the Ontario

Municipal Board. Unfortunately, this same prohibition does not apply to species with lower at-risk status, such as threatened species or species of special concern.

Primacy of other legislation: Greenbelt Act
The *Greenbelt Act*, which provides the authority for the province to create the Greenbelt Plan, specifically states that it takes primacy over the PPS, municipal official plans, and zoning by-laws. The PPS itself states that provincial plans, such as the Greenbelt Plan, take precedence over the PPS to the extent of any conflict.

Primacy of other legislation: Oak Ridges Moraine Conservation Act
The *Oak Ridges Moraine Conservation Act* takes primacy over any official plan, by-law, or the PPS. Further, the PPS itself states that provincial plans, such as the Oak Ridges Moraine Conservation Plan, take precedence over the PPS to the extent of any conflict.

Primacy of other legislation: Niagara Escarpment Planning and Development Act
Official plans and municipal by-laws are required to conform with the *Niagara Escarpment Planning and Development Act*. Further, the PPS itself states that provincial plans, such as the Niagara Escarpment Plan, take precedence over the PPS to the extent of any conflict.

Primacy of other legislation: Places to Grow Act (Bill 136)
The *Places to Grow Act*, which provides the authority for the province to create provincial "growth plans," specifically states that approved growth plans will have primacy over the PPS, official plans, and zoning by-laws. The draft legislation does state that if a conflict relates "to the natural environment or human health, the direction that provides more protection to the natural environment or human health prevails." However, the Lieutenant Governor in Council may make regulations to provide further detail, and perhaps, over-ride this default position.

Source water protection
The 2005 PPS contains new provisions with regard to water quality, such as requiring planning authorities to identify "surface water features, ground water features, hydrologic functions and natural heritage features and areas which are necessary for the ecological and hydrological integrity of the watershed." Development and site alteration are now "restricted" to ensure that "these features and their related hydrologic functions will be protected, improved or restored." Planning authorities also must only give "consideration" to these features for activities such as significant transportation corridors and infrastructure facilities. Additionally, the PPS does not state that aggregate operations are restricted in any of these features, only that extraction shall minimize environmental impacts.

In May 2002, Justice O'Connor released his Part II Report of the Walkerton Inquiry, in which he called for a systematic approach to land use planning that protects drinking water sources. Recommendation 5 of this report was that municipal official plans and zoning decisions be required to be consistent with the source protection plan in cases of significant direct threat to a drinking water source; that plans should designate areas where such consistency is required; and, that municipal official plans and decisions should otherwise have regard to the source protection plan. Justice O'Connor also wrote: "I encourage the MOE to try to establish the framework within six to eight months after the release of this report." Although the government committed to implementing all of Justice O'Connor's recommendations, source protection legislation is still at the draft stage as of April 2005. The ECO urges MOE to move ahead with source protection implementation, including all the necessary revisions to the current version of the PPS and other planning legislation.

Class Environmental Assessments and the PPS
Project approvals that involve infrastructure, such as sewage systems or transportation corridors, may require approval under other legislation. For example, the Ministry of Transportation's (MTO) Class Environmental Assessment for Provincial Transportation Facilities is the key approval process for planning, designing and building new highways, as well as expansions or alterations of existing provincial roadways.

The PPS essentially defers to such class environmental assessments as none of the prohibitions or constraints that apply to protecting natural heritage, as well as sensitive surface and ground water features, include activities involving infrastructure. However, the ECO has raised concerns on numerous occasions – including both in the 2003/2004 annual report and this year's annual report – that significant problems exist with respect to the application of such class environmental assessments and the resultant effects on the environment.

Provision of natural heritage information by MNR to planning authorities
The Ministry of Natural Resources (MNR) is responsible, according to the PPS, to approve of the significant habitat of endangered species and threatened species. For municipalities to effectively plan for this integral component of natural heritage, MNR must proactively disseminate this information to planning authorities before they make key decisions on official plans.

The ECO has repeatedly raised concerns with MNR's species at risk program, including the need to revise the legislation and expand the scope of the ministry's program. Additionally, the ECO is concerned that municipalities and conservation authorities are not receiving up-to-date information on the locations of the habitat of species at risk. The ECO believes that this problem is compounded by MAH's "One Window Planning" approach that limits the role of other ministries, such as MNR, in the planning system. Detailed and current information on species at risk is essential for municipalities and conservation authorities to be able to conduct their natural heritage planning, as well as for planning authorities being able to achieve the purposes of the PPS.

Lack of a role for national parks, provincial parks, conservation reserves, and conservation areas
The PPS does not incorporate provincial parks, conservation reserves, and conservation areas into the provisions relating to the conservation of natural heritage. These publicly-held lands are administered by MNR and, in the case of conservation areas, local conservation authorities. National parks, which are also not incorporated into the PPS, are administered by Parks Canada and they are essentially the only sites in Ontario whose sole purpose is to conserve ecological integrity – a far higher scientific and legal standard than natural heritage. The PPS does state that, "Healthy, active communities should be promoted by… *considering* the impacts of planning decisions on provincial parks, conservation reserves and conservation areas." The PPS does not make mention of national parks.

The ECO believes, at a minimum, that development and site alteration should not be permitted on lands adjacent to these protected areas unless it can be demonstrated that there will be no negative ecological impacts. By recognizing the integral contribution of these protected areas to the conservation of natural heritage, MAH would be positioning the PPS to take a systems approach rather than a narrow site-specific approach. Further, this approach would make MAH's land use policies more consistent with MNR's proposed revisions to its protected areas legislation.

Policies of other ministries: MNDM
Various sections of the PPS directly cite or infer the use of policies that are the responsibility of ministries other than MAH. The ECO supports this approach in principle as other ministries will have expertise in specific areas related to planning that MAH does not possess. However, for the PPS to be effectively

implemented, it must be clearly indicated which other policies apply and these related policies must be kept up-to-date and accessible.

For example, the definition of areas with "significant mineral potential" may affect where and how development occurs in some parts of the province. The PPS defines this term as an "area identified as provincially significant through comprehensive studies prepared using evaluation procedures established by the Province, as amended from time to time, such as the Provincially Significant Mineral Potential Index." This is in fact a reference to a policy called the "Provincially Significant Mineral Potential Procedural Manual for Ontario" that is a responsibility of the Ministry of Northern and Development and Mines (MNDM).

This policy was proposed three years ago by MNDM, but as of 2005 no decision notice had been placed on the Environmental Registry. Not posting a decision notice in a timely manner leaves the ECO and the public speculating whether such policies were ever adopted. In this case, the ECO must conclude that this policy was adopted if has been incorporated into the 2005 PPS.

Policies of other ministries: MNR

The PPS defines significant wetlands, coastal wetlands, and areas of natural and scientific interest as an area identified by MNR using "evaluation procedures established by the Province, as amended from time to time." In part, this is an indirect reference to several MNR policies including the Natural Heritage Reference Manual and the Ontario Wetlands Evaluation Manuals. For example, MNR's Natural Heritage Reference Manual, released in 1999, is "a guide for those who require additional information on technical issues relative to the application" of the PPS.

In contrast, in defining significant wildlife habitat, the PPS does not make reference to existing MNR policies or the need for ministry approvals. However, MNR released its Significant Wildlife Habitat Technical Guide in 2000. The purpose of this policy is to assist planning authorities in implementing the PPS by providing technical "information on the identification, description, and prioritisation of significant wildlife habitat." By not stating a need for ministry evaluation procedures, the PPS leaves identification of this particular nature heritage feature to the discretion of the planning authority.

In April 2005, MNR released its proposed Ontario Biodiversity Strategy for public consultation on the Environmental Registry. However, little relief can be found in this proposed strategy with respect to natural heritage as it does not contain any new land use planning measures to conserve natural heritage. In fact, one of its "strategic directions" is to implement the 2005 PPS "to ensure effective direction to promote managed growth, sustainable development, a strong economy and a healthy environment." Also strikingly contradictory to the goal of conserving biodiversity is the proposed strategy's objective of implementing growth plans to "sustain a robust economy."

Policies of other ministries: OMAF

With respect to agriculture and permitted uses, the PPS states that "new land uses, including the creation of lots, and new or expanding livestock facilities shall comply with the minimum distance separation formulae." This necessitates referring to two policies of the Ontario Ministry of Agriculture and Food (OMAF) that dictate requirements for official plans and relevant municipal by-laws. Introduced in 1995 and last reviewed by OMAF in 2003, the Minimum Distance Separation (MDS) I and II policies determine recommended distances between livestock facilities and other land uses, particularly with regard to environmental impacts relating to odour, noise, and dust. These OMAF policies have never been posted on the Environmental Registry for public consultation.

The PPS defines, in part, "prime agricultural areas" as having been "identified by the Ontario Ministry of Agriculture and Food using evaluation procedures established by the Province as amended from time to time, or may also be identified through an alternative agricultural land evaluation system approved by the Province." This is an indirect reference to an OMAF policy, A Guide to Land Evaluation and Area Review (LEAR) System for Agriculture – Draft, that was created in 2002 and last reviewed in 2003. OMAF also has developed alternative land evaluation systems, such as The Regional Municipality of Ottawa-Carleton Land Evaluation and Area Review (OCLEAR) System for Agriculture that was created in 1998 and last reviewed in 2003. OMAF has not posted these two policies on the Environmental Registry for public consultation.

Public Participation & *EBR* Process

2001 Consultations (PF01E0002)

On July 30, 2001, MAH posted a proposal notice on the Environmental Registry to solicit public comment on its five-year review of the PPS. This proposal notice originally had a 60-day comment period that was later extended to 74 days to coincide with the timeframe of other consultations related to the Smart Growth initiative. The ministry also distributed a consultation booklet to Ontario government information centres, stakeholders and all municipalities. Eight regional workshops and six open houses also were conducted across the province in the early fall of 2001. MAH also published notices of the PPS review in some Ontario newspapers.

MAH received over 200 comments as a result of these consultations, of which 23 specifically cited the Environmental Registry number. The ministry then prepared a report that summarized this consultation and highlighted the range of issues identified by stakeholders. This report was posted on the ministry's internet site and was also distributed to provincial ministries, Ontario government information centres, stakeholders, municipalities, and participants from the regional workshops. (For the complete summary of these consultations, readers should refer directly to MAH's Five-Year Review of the Provincial Policy Statement: Summary of Consultations. This report is available on the ministry's internet site.)

Input from diverse stakeholder groups indicated that, overall, the structure, length and layout of the PPS was generally satisfactory. However, stakeholders said that MAH should consider revisions to the PPS in order to:

- Provide direction and rationale for the policies;
- Give more direction in policy areas such as the environment, Smart Growth, and the balancing of provincial interests;
- Update certain policies to reflect new standards and responsibilities;
- Refine and/or elaborate on policies to ensure their continued effectiveness, including those on natural heritage, housing, servicing and infrastructure, transportation, agriculture, managing growth and mineral resources;
- Provide strong policies for the protection of water; and,
- Address emerging and implementation issues.

Some commenters said that the government should: articulate a land use planning vision for Ontario; provide more guidance for growth management; give greater direction for unorganized areas/Crown lands; promote, and be more actively engaged in, planning for large geographic areas; and, be more involved in providing planning expertise and defending provincial issues. Suggestions also were made that MAH should actively measure the performance of the PPS, as well as providing data to aid in its implementation and planning decisions at the municipal level.

Stakeholders said environmental protection should be a key priority in land use planning and a critical determinant of quality of life. Common themes expressed by commenters were that the PPS should have a stronger environmental focus, address cumulative impact, and ensure that the environment is a key consideration when balancing provincial interests. Some stakeholders advocated that the PPS should have an "environment-first" approach.

Water protection was a universal theme in the comments, according to MAH. Some stakeholders were concerned that the policies related to water in the 1996 PPS did not give sufficient detail and direction, as well as not giving water the priority that it merits. A variety of stakeholder groups stated that water should be seen as a primary resource and its protection should take priority over other land uses.

Commenters stated the effectiveness of the PPS depends on its successful implementation. While some comments were directly within the scope of the MAH's review, other comments pertaining to funding and planning-related initiatives were not considered, according to the ministry. However, a shared theme among municipal, environmental, and other stakeholders was the need for more provincial-level technical information, expertise, and best practice guides to assist in implementing PPS' objectives. However, some interest groups did not support these types of guides.

2004 Consultations (PF04E0004)

On June 3, 2004 MAH posted a proposal notice on the Environmental Registry to solicit comment on this second round of consultations on revisions to the PPS. This proposal notice had an 89-day comment period, coinciding with other consultations that were part of the broader Planning Reform initiative. According to the ministry, over 600 written submissions were received from stakeholders in response to the overall Planning Reform consultations, but only 31 comments specifically cited the Environmental Registry number for the PPS proposal. The ministry maintains that all of the comments related to Planning Reform were considered in the development of the new PPS. Commenters included the public, municipalities and a wide variety of non-governmental organizations and some government organizations. Many of the comments that were received as a result of this consultation in 2004 were similar to those from the 2001 consultations.

Several commenters were concerned that the PPS fails to undertake a systems approach with respect to natural heritage. While the PPS does recognize a suite of natural features, it does little to address these features as a whole nor does it adequately address their connectivity. These commenters suggested that the PPS be revised to require municipalities to actively plan for a natural heritage system, which would also facilitate other watershed-based planning such as source protection.

Many commenters took issue with the implied priorities of the PPS. The draft 2005 PPS stated that "development will generally be directed away from natural heritage features and areas." These commenters also noted that the draft version gave more priority and clarity to other planning issues, such as that "mineral aggregate resources shall be protected for long-term use." MAH did subsequently change this wording, so that "natural features and areas shall be protected for the long-term."

One stakeholder commented that confusion often arises as to which guidelines and technical manuals are current and applicable. The stakeholder suggested that MAH should act as a depository for all planning-related policies of other ministries. These documents should be accessible to the public, agencies, municipalities and the development industry through MAH's internet site.

Concern was raised by numerous stakeholders with regard to the treatment of "significant woodlands" in the PPS. The most significant shortcoming, according to these stakeholders, was the lack of supporting guidelines or policies for identifying and assessing woodland significance. Some of the stakeholders also said that no development or site alteration should be permitted in significant woodlands, not just that such activities should have "no negative impacts."

Numerous commenters took issue with the section of the PPS addressing mineral aggregate resources, especially the statement that the demonstration of need, including any type of supply/demand analysis, shall not be required for aggregate resource operations. One commenter said that, "aggregate extraction is such an environmentally intrusive land use, with long-term impacts on the water regime and on natural heritage planning… that it is inconceivable that new aggregate extraction be permitted to proceed without a comprehensive supply/demand analysis." Many of these commenters cited the urgent need to create a province-wide strategy for aggregates in which to identify priority sites for extraction, in addition to restricting extraction in other areas.

Concern also was raised with the implied assumption that growth is necessary. These stakeholders were concerned with the PPS's requirement that municipalities maintain a 10-year supply of lands for residential growth and 20-year supply for general development. As one stakeholder observed, the PPS "seems to assume that all municipalities across the province will continue to expand forever…. even growth accommodated within existing urban boundaries can put undesirable and ill-advised strain on a community's local resource base."

One stakeholder expressed apprehension over ambiguities with regard to the implementation provisions. The PPS states that "the Minister of Municipal Affairs and Housing may take into account *other considerations* when making decisions to support strong communities, a clean and healthy environment and the economic vitality of the Province." This stakeholder requested that these "other considerations" be detailed in the final version of the 2005 PPS, but the ministry chose not to describe them. In part, this provision is a veiled reference to the primacy of other legislation and provincial plans, the authority of the Minister to enact ministerial zoning orders, and the new authority of the Minister to declare a provincial interest in a planning matter that is before the Ontario Municipal Board. The ECO believes that this provision gives Cabinet wide discretionary powers that do not necessarily require adherence to the PPS.

Numerous commenters cited the need to have publicly available performance indicators of the PPS. One of these commenters noted that the previous 1996 version of the PPS had a similar stipulation regarding indicators, but that "even now, some eight years later, no draft performance indicators have been released for public review." Many disparate commenters throughout this current review expressed their frustrations at not being able to objectively comment on the proposed changes without such indicators.

SEV

The ECO believes that MAH inadequately considered its Statement of Environmental Values (SEV). The ministry provided the ECO with an 'environmental significance test form.' This form appears to be primarily intended to assess whether a proposal is environmentally significant and if it should be placed on the Environmental Registry for public comment. For example, the concluding remarks made by the ministry on this form were that "the *EBR* posting period should be 90 days, if possible." Obviously, MAH completed this form before the proposal notice was even posted to the Environmental Registry, despite the fact the *EBR* requires MAH to consider its SEV in reaching a final decision.

This form does make mention of the ministry's SEV. However, it is generally limited to a template format in which 'yes' or 'no' boxes are checked. This simplistic approach provides little or no pertinent information to the ECO or the public in how the ministry's SEV was considered in reaching a decision. While this form may serve a useful purpose internally for MAH in determining if an environmentally significant proposal should be placed on the Environmental Registry, it does not constitute a SEV consideration.

The ECO has criticized MAH on this exact issue in the past. In the Supplement to 2001/2002 annual report, the ECO observed that "the process of SEV consideration seems to be confused at MAH. Currently, the ministry partially considers its SEV as part of a checklist when deciding if a proposal is one that should be placed on the Environmental Registry. While this thoroughness is appreciated, MAH's SEV is supposed to be meaningfully considered in making the ultimate decision on a proposal, in keeping with the ministry's obligations under the *EBR*. The ECO has contacted MAH about this matter and is optimistic that MAH will revise its SEV consideration procedures in the 2002/03 reporting period." As demonstrated by the case of PPS, it appears that MAH has made no progress in the last three years in revising its SEV consideration procedures.

Other Information

Readers should refer to the ECO's reviews of the *Strong Communities (Planning Amendment) Act, 2004* (Bill 26) and the *Greenbelt Act* (Bill 135) in this Supplement.

The ECO notes that the PPS is effectively removed from the provisions of the *EBR* related to applications for review. The *EBR* gives prescribed ministries the discretion to not conduct a review of a policy if it has been introduced within the last five years. As MAH is required to review the PPS every five years, any *EBR* application for review would either be within the last five years of the PPS being issued or during the time of an on-going review. As such, MAH likely would be legitimately allowed to deny any application for review under the *EBR* unless the applicants could provide persuasive new evidence that was not previously considered. The ECO encourages MAH to assess any future applications for review on their own merits and, if warranted, not wait until the time of scheduled reviews to revise the PPS.

ECO Comment

The importance of the PPS cannot be over-stated. It is the collection of quasi-rules that underpins Ontario's approach to planning. They guide the practice of planning, literally shaping the landscape of the province. They also serve to reflect the priorities and values of the Ontario government. Part of the rationale of the Planning Reform initiatives that have been undertaken, of which the PPS is a part, was to provide a stronger "green" focus. No longer labelled as "Smart Growth," these planning reforms are now designed to achieve "Strong Communities."

The PPS addresses a wide spectrum of planning issues, ranging from economic to environmental issues. It states that there is "no implied priority in the order in which the policies appear" in the 2005 PPS. Nevertheless, the 2005 PPS and the various laws that shape how it is implemented unequivocally establish priorities. Environmental planning and protection – natural areas, wild species and water quality – are not given the same importance as economic drivers. This fact is not new, but rather, indicates that minimal progress has been made.

Municipalities must now actively plan for residential and commercial growth and set aside sufficient lands in order to meet rigid growth targets. The 2005 PPS weaves in and facilitates the supporting mechanisms for this burgeoning growth, by granting special exemptions for infrastructure such as roads and corridors for electrical powerlines. The entire planning system pre-supposes this growth and has been explicitly designed for it. From a strictly traditional economic perspective, this approach might be sound.

From an ecological or sustainability perspective, this planning approach will fail in the long-term. Few of the critical elements of the natural environment – significant woodlands, wetlands, valleylands, species, sensitive water features – are adequately protected. In fact, virtually none of them are protected from some of the über-development activities such as aggregate extraction or highway construction. Natural features are often treated simply as end-stage checks on development. Many of the natural features are not even required to be identified or comprehensively planned for by municipalities. The ECO believes that the natural environment must be treated as an integrated system and, at a minimum, given at least equal weight to other planning considerations.

The approach taken by the PPS often forces the defence of environmental interests on a case-by-case, woodlot-by-woodlot, and wetland-by-wetland basis. This is not a new problem and the ECO has raised similar concerns in the past, including the case of Marshfield Woods in our 2000/2001 annual report. In that report, the ECO recommended that "MAH and other ministries consider, as part of the five-year review of the Provincial Policy Statement, the need for clearer provincial requirements for municipalities regarding the protection of environmentally significant lands."

Supporters of natural heritage often bear the burden of proving the ecological significance of such areas, and they must often justify their protection on the grounds that they provide 'environmental services.' Rather, the onus – starting at the very onset of the planning process – should be placed on the development pressures themselves to justify need. Taking such an ecologically sensible approach might require that individual development activities demonstrate their own 'significance' and societal need to merit intrusion on a natural heritage system.

Many municipalities simply do not have the resources or capacity to cope with development pressures and, perhaps, direct growth towards a steady-state. Nor is it necessarily in their financial interests to do so as residential and commercial growth contributes to an increasing taxation base. It also creates a confrontational system where a local municipality may even advocate a particular development activity, but the local conservation authority – funded by that same municipality – is left to oppose it on environmental grounds.

This 'development-first, environment-second' approach to planning has spawned a confusing mix of legislation and provincial plans. Rather than viewing an ecological feature, such as a provincially significant wetland, as being important enough to protect no matter where it is situated in the province, the PPS necessitates that separate rules be created depending on its location. The result is that the same type of natural area will receive different treatment whether it lies on specific parts of the Niagara Escarpment, in the Greenbelt, on the Oak Ridges Moraine, in southern Ontario or in northern Ontario. A planning system that uses the PPS to be "complemented by provincial plans or locally-generated policies" ensures that inconsistent consideration, at best, will be given to the environment.

Review of Posted Decision:
Bill 26, *Strong Communities (Planning Amendment) Act, 2004*

Decision Information:

Registry Number: AF03E0001
Proposal Posted: December 16, 2003
Decision Posted: April 12, 2005

Comment Period: 90 days
Number of Comments:
Came into Force: November 30, 2004 and various other dates (see below)

Description

The *Strong Communities (Planning Amendment) Act, 2004* (*SCA*) was enacted by the Ontario government in November 2004 as part of a broader Planning Reform initiative. When this bill was introduced in the legislature in December 2003, the Minister of Municipal Affairs and Housing announced that it would give communities the tools to control their own planning and allow locally elected decision-makers to control urban sprawl. The *SCA* was the first of a number of land use planning regime changes that have been made or proposed by the current government since it was elected in October 2003. Other related initiatives that were brought forward by the government during the reporting period included the *Greenbelt Act*, the new Provincial Policy Statement (2005 PPS) and the *Places to Grow Act*.

One of the most significant changes to the *Planning Act* made by the *SCA* is the requirement that decisions by planning approval authorities "be consistent with" provincial policy statements. This phrase replaces the former wording in section 3 of the *Planning Act* that had provided that decision-makers "have regard to" provincial policy statements. This requirement to be consistent with provincial policy also now applies to comments, submissions or advice affecting a planning matter.

Another amendment provides that where the minister holds the opinion that certain planning instruments that have been appealed to the Ontario Municipal Board (OMB) adversely affect a matter of provincial interest, the minister may advise the OMB of this in writing no later than 30 days before the hearing is to begin. The minister should identify to the OMB the provisions of the plan that adversely affect the provincial interest and the general basis for this opinion. Where the minister has declared a provincial interest in relation to a planning instrument, the OMB's decision on it will not be final and binding unless confirmed by Cabinet. Cabinet may decide to confirm, vary or rescind the OMB's decision and in so doing, may direct the minister to modify the provisions of an official plan or amendment that adversely affect a matter of provincial interest, or may itself repeal or amend a zoning by-law or amendment.

In another important change, the *SCA* adds new provisions to the *Planning Act* concerning appeals of area of settlement boundaries. The *SCA* also provides a definition for the term "area of settlement," stating it to mean an area of land designated in an official plan for urban uses.

The *Planning Act* now provides that a person or public body may not appeal proponent-initiated official plan amendments (OPAs) and by-law amendments to the OMB where the municipality has not adopted the amendment. The types of OPAs that are not subject to appeal are:

- A proposal to alter the boundary of an area of settlement or establish a new area of settlement in a municipality;
- A refusal to approve a proposal to alter the boundary of an area of settlement or establish a new area of settlement in a municipality, if the plan formed all or part of an OPA; or
- A proposal to alter the boundary of an area of settlement or establish a new area of settlement in a municipality, if the plan formed all or part of an OPA.

There is, however, an exception that allows a person or public body to appeal an OPA to the OMB regarding any part of a plan to alter the boundary of an area of settlement or establish a new area of settlement in a lower-tier municipality, if that part of the plan does conform with the official plan of the upper-tier municipality. The *SCA* also prevents a person or public body from appealing a requested by-law amendment to the OMB if it would implement the alteration of the boundary of an area of settlement or implement a new area of settlement in a municipality.

A number of amendments made by the *SCA* extend the time period that approval authorities have to make various decisions before an appeal may be made to the OMB. Prior to these amendments, a person or public body could initiate an appeal of many types of pending decisions under the *Planning Act* if no decision on the planning approval had been made after 90 days. The *SCA* increases the period of time allowed to make these decisions from either 60 or 90 days to 90, 120 or 180 days depending on the type of planning application. The period of time permitted for making decisions on amendments to by-laws and holding by-laws is extended from 90 to 120 days. A related *SCA* amendment extends the period of time given to approval authorities to make decisions on consent applications from 60 to 90 days.

The *SCA* removes other time requirements completely. The *Planning Act* is amended to remove the requirement that a municipal council or planning board must hold a public meeting, or comply with alternative measures in the official plan, within 65 days of receiving a request for an OPA. Another amendment removes a related provision that had permitted the appeal of an OPA to the OMB if a council or planning board failed to give notice of a public meeting within 45 days of the OPA request being received.

The *SCA* also provides the minister with new powers to make regulations. The minister may make a regulation that modifies or replaces all or any part of the definition of "area of settlement" in the *Planning Act*. The minister may also make regulations concerning transitional matters related to amendments made by the *SCA*.

A number of the sections of the *SCA* were deemed to have come into force retroactively, on December 15, 2003 when the *SCA* was first tabled in the legislature. Section 2 of the Act, changing the "shall have regard to" language to "shall be consistent with," came into force on proclamation by Cabinet on March 1, 2005, the same day that the 2005 PPS came in force. All other sections were in force on the day the *SCA* received Royal Assent, November 30, 2004.

Implications of the Decision

The Minister of Municipal Affairs and Housing has emphasized that the reforms in the *SCA* would take some powers to make land use planning decisions away from the OMB and give them to local municipal councils. This is evident in the amendments that curtail appeals of area of settlement boundaries, and extend the time periods allowed for municipalities to hold public meetings and make decisions on planning approvals before they may be appealed to the OMB. However, the *SCA* also re-establishes a stronger provincial role in shaping planning decisions. This can be seen in the change to the "be consistent with" language and the ability to declare a provincial interest. Similar to changes enacted in 1994, discussed below, the legislature appears to be attempting to strike a balance between local autonomy and strong provincial oversight in land use planning.

Shall be consistent with

Much attention has been given to the change in wording that requires decision makers to be consistent with provincial policy. This language has been used in the *Planning Act* in the past. In 1994, the NDP government amended the Act to require that decisions be consistent with provincial policy statements. The change at that time was the result of recommendations by the Commission on Planning and

Development Reform in Ontario, headed by John Sewell in the early 1990s. At the same time that the government introduced the new language, it produced in 1995 lengthy and detailed new provincial policies, the *Comprehensive Set of Policy Statements*. Many considered these policy statements and the implementation guidelines that accompanied them to be confusing and sometimes contradictory. Less than one year after the Conservative government was elected in June 1995, it amended the *Planning Act* to return to the "shall have regard to" language and released a single consolidated document, significantly reduced in size, titled the Provincial Policy Statement (1997 PPS).

The *SCA* does not provide a definition of the phrase "shall be consistent with." Because this language was used in the *Planning Act* for only a brief time, there were few decisions considering the precise meaning of this phrase. However, these decisions suggest that the "be consistent with" standard requires greater adherence to the 2005 PPS. In a 1995 OMB decision, the Board noted the change from "shall have regard to" to "shall be consistent with" and held that the legislature clearly intended to require the Board to give greater weight to the policy statements. In a later decision, the OMB commented that "shall be consistent with" provided very little, if any, discretion in applying the terms of provincial policy. It has also been suggested that the standard of being "consistent with" provincial policy lies somewhere on a spectrum between "have regard to" and "conform with."

In contrast, a number of OMB and court decisions have considered the meaning of "shall have regard to," and produced varying interpretations. For example, in *Re York (Regional Municipality) Official Plan Amendment No. 4*, the OMB, in its decision, quoted a land use planner as having stated that an approval authority need "only" have regard to the 1997 PPS. When the citizens' groups involved sought leave to appeal this decision, Ontario's Divisional Court considered the correct way to interpret the phrase "have regard to," asking "whether the planning authorities and the OMB must seriously, conscientiously and carefully consider the provincial policy guidelines or whether it is sufficient simply to pay lip service to them." The court criticized the OMB panel for using the dismissive word "only" in relation to having regard to the 1997 PPS and decided that it was...

> ... open to serious question whether the Board 'had regard' to the provincial policies in the sense of considering them carefully in relation to the circumstances at hand, their objectives and the statements as a whole, and what they seek to protect, and determining whether and how the matter before it is affected by, and complies with, such objectives and policies, with a sense of reasonable consistency in principle.

Although some decision-makers may have merely paid lip service to the 1997 PPS under the "have regard to" standard, others interpreted it to mean that provincial policy should be seriously considered. It has been observed that concerns about decision-makers not properly considering the 1997 PPS because of the "have regard to" language have been overstated, and so the change in language may not result in a material change in how decision-makers will apply provincial policy under the new standard as compared to the previous one. However, the "shall be consistent with" language is certainly less ambiguous than "shall have regard to." It is likely that a more consistent application of provincial policy in planning decisions will mean that provincial interests generally take priority over local interests.

In submissions during the Standing Committee hearings on the *SCA* one group suggested that a definition of "be consistent with" should be included in the recent land use planning reform initiatives to clarify the intent of the legislature and provide clear guidance on how competing interests might be balanced.

Provincial interest

Provincial power over land use planning is greatly strengthened by the ability of the minister to declare a provincial interest in an appeal before the OMB, and of the Cabinet to subsequently overturn or confirm the OMB decision on that appeal. This change returns powers that were present in earlier iterations of the *Planning Act*.

Even prior to the amendments made by the *SCA*, the concept of the provincial interest was recognized in s. 2 of the *Planning Act*. Section 2 requires that decision-makers under the Act shall have regard to, among other matters, an extensive list of matters of provincial interest that is set out in this provision.

Concerns have been expressed about the accountability of the Ontario government with respect to the power to declare a provincial interest in an OMB appeal. Some have submitted that the 2005 PPS should state explicitly the criteria that will be used to identify a matter of a provincial interest. Another group suggested that proposals to declare a provincial interest be classified as instruments under the *EBR* and posted for public notice and comment on the Environmental Registry, thus ensuring that the ECO will have legal authority to review decisions on these declarations. Others have recommended that the power to declare a provincial interest be removed from the *SCA* entirely.

The Minister of Municipal Affairs and Housing has predicted that this power is unlikely to be abused, noting his understanding that during past periods of time when similar provisions were in effect in the Act, there have been only four declarations of provincial interest: in 1984 relating to the Thunder Bay airport; in 1989 relating to the Etobicoke motel strip; and twice in 1994 relating to the Rouge Park and the Metro Toronto Convention Centre expansion.

It has also been suggested that the province should be required to declare a provincial interest earlier than the minimum 30 days before an OMB hearing as provided in the *SCA*. The rationale for earlier notice is that appeals involving a provincial interest concern major policy decisions, and the parties involved need adequate time to prepare before making arguments on these issues at the hearing.

Earlier versions of the *Planning Act* provided that the province had the power to state a provincial interest in a matter before the OMB where it was "affected" by a planning instrument. The language used in the *SCA* is "adversely affected." This change in language may narrow the right of the province to intervene on the basis that provincial interest must be affected in an adverse fashion, and not merely affected by the matter.

Where the province declares a provincial interest and Cabinet reviews an OMB decision, a question has been raised as to whether Cabinet must be consistent with the 2005 PPS. When asked about this at the Standing Committee hearings on the *SCA*, the Minister of Municipal Affairs and Housing responded that

> You would expect any cabinet to adhere to its own provincial policy statement. As to what may happen in any one particular case, who knows what other interests may come forward? But as a general rule, there's no question about it: The government of the day should stand by its own provincial policy statement because it, after all, put that forward....It's obviously my hope that all government ministries adhere to the provincial policy statement. That's really about all I can say about that at this stage.

It seems clear from the minister's statement that Cabinet is not necessarily under an obligation to adhere to the 2005 PPS when reviewing an OMB decision on the basis of a declared provincial interest. This appears to be consistent with case law on judicial reviews of Cabinet decisions.

However, the provincial Cabinet once again does have the power to overturn decisions of the OMB. This means that the OMB will be less likely to use its discretion to rule against positions favoured by the province in relation to matters of provincial interest. It may also bring increased lobbying pressure on the provincial government from parties who are not successful before the local decision-making body.

Areas of settlement

The *SCA* takes away the right of parties to appeal to the OMB an application to expand an existing settlement area boundary or create a new settlement area that is not supported by the municipality. This amendment was a response to frustration on the part of municipalities who had to deal with these appeals even after their approved official plans had been developed with a great deal of public consultation. Such appeals cost municipalities extra expenses and resources in order to defend their official plans before the OMB.

Municipalities are now in a stronger position to prevent developers and other private parties from altering settlement area boundaries or creating new ones that the municipalities do not support, by removing the right of appeal in such cases. This amendment is related to other provincial land use planning initiatives that seek to direct urban growth to the most appropriate areas, such as the *Greenbelt Act* and the *Places to Grow Act.*

The first reading version of the *SCA* framed this amendment as applying to "urban settlement areas." After Standing Committee hearings, this was amended at second reading to refer instead to "areas of settlement" in order to clarify that the elimination of the right to appeal changes to settlement boundaries not supported by the municipality apply to all settlement areas, both urban and rural. As noted above, the *SCA* defines an "area of settlement" as an area of land designated in an official plan for urban uses. It is interesting that the *SCA* gives the minister the regulation-making authority to modify or replace all or any part of the definition of "area of settlement" in the *Planning Act.* It is unusual and problematic to create a situation where a regulation may override a legislative provision. In recent years, there have been other examples of the government choosing to provide the speed and flexibility inherent in the regulation-making process in order to amend a section of a law. From a legal perspective, however, this is not appropriate and is quite controversial.

Extended time periods

The *SCA* extends time periods for making decisions and holding public meetings on planning applications to address concerns that the municipalities have not had sufficient time to give meaningful consideration to planning applications, and that the public has not been given the opportunity to fully participate in the planning process due to the limited time periods for review. While the extended time periods will allow for greater public and municipal scrutiny, they will leave developers in a position of greater uncertainty.

Implications for OMB

Almost all of the amendments in the *SCA* have implications for the OMB. The extended time periods granted to municipalities and other decision-makers mean that fewer planning applications will likely be appealed to the OMB on the basis that a decision has not been made quickly enough. The OMB will no longer hear any appeals on additions or extensions to areas of settlement boundaries that are not supported by the municipality. Where the government declares a provincial interest in relation to an appeal before the OMB, the Board will decide that appeal with the knowledge that it will be reviewed by Cabinet and may be changed. Finally, the discretion of the OMB will now be constrained by the requirement that it be consistent with the 2005 PPS.

In sum, many of the changes made by the *SCA* are intended to address criticisms that have been levelled against the OMB in recent years. Among these criticisms are allegations that the Board has been too favourable to developers in its decisions, that it has not always adequately considered provincial policy, and that its often long, costly hearings have been inaccessible to members of the public unless they can hire lawyers, which is usually financially prohibitive.

In addition to the implications that the *SCA* has for the OMB, the provincial government has been planning further reforms for the Board that were expected to be announced in the spring or summer of 2005.

Transition

The *SCA* amendments to the *Planning Act* have raised a number of transition issues, including questions as to retroactivity. As noted above, the minister has regulation-making authority to deal with transitional matters under the *SCA*.

Transitional provisions were set out in detail in O. Reg. 385/04, and subsequently amended by O. Reg. 63/05, under the *Planning Act*. This regulation provides that the amendments made by the *SCA* will be applied retroactively to some planning applications that were initiated after the *SCA* was introduced in December 2003, but before it became law in November 2004. Thus, any matters commenced before December 15, 2003 will be dealt with under the *Planning Act* as it read prior to the *SCA*. Matters commenced on or after December 15, 2003 and before November 30, 2004 are also not subject to the new provisions, with the exception of applications for OPAs and zoning by-law amendments that alter an area of settlement boundary or establish a new area of settlement which are subject to the *Planning Act* as amended by the *SCA*.

It is important to note, however, that nothing in the O. Reg. 385/04 transitional provisions affects the minister's discretion to make a declaration of provincial interest in a matter, regardless of when it was commenced.

Public Participation & *EBR* Process

The Ministry of Municipal Affairs and Housing (MAH) posted a proposal notice for Bill 26, the *SCA*, on the Environmental Registry on December 16, 2003 (Registry #AF03E0001), the day after the draft legislation was introduced in the legislature for first reading. The Registry notice allowed for a public comment period of 90 days that ended on March 15, 2004. A decision notice on this proposal was not posted on the Registry until April 12, 2005, more than four months after the bill became law. In its decision notice, MAH stated that it received more than 100 written and electronically-submitted comments on the *SCA*, but that only 14 written comments specifically cited the Registry notice. These 14 comments were provided to the ECO for our review of this decision. Some additional stakeholders sent comments to the ECO directly.

Besides the Registry notice and comment period provided under the *EBR*, MAH also provided additional opportunities for public participation. In June 2004, MAH released three discussion papers related to various land use planning initiatives being undertaken in the province. The papers addressed: potential further reforms to the *Planning Act*, the review of the 1997 PPS; and potential reforms to the OMB. In addition to receiving written submissions, MAH held stakeholder consultations on these discussion papers. Although the *Planning Act* paper encouraged submissions on reforms beyond those in the *SCA*, it noted the *SCA* reforms and members of the public did comment on the amendments proposed in Bill 26.

Legislative committee hearings on the *SCA* were held in September 2004 and some changes were made in committee at second reading in response to the submissions received by the committee.

MAH provided a summary of the comments it received in its decision notice on the *SCA*. It noted that stakeholders who commented included members of the public, municipalities and a wide variety of non-governmental organizations. In its decision notice, MAH stated that stakeholders generally supported the proposed amendments in the *SCA*, especially the four most significant amendments made to the bill: the change in language from "urban settlement area" to "area of settlement;" the addition of a requirement that MAH identify the general basis for its opinion when it declares that a matter of provincial interest is, or is likely to be, adversely affected; an amendment to provide that the coming into force of the new "shall be consistent with" implementation standard be delayed until the 2005 PPS is effective; and a commitment to develop a regulation to guide transitional issues arising out of the *SCA* amendments.

The comments MAH provided to the ECO for review were submitted by municipalities, ENGOs and members of the public. Other stakeholder perspectives were not represented in the comments provided to the ECO by MAH. For example, groups representing developers and the construction industry vigorously opposed the various amendments in the *SCA*.

All but one of the six municipal councils that commented under the *EBR* supported the change in language from "shall have regard to" to "shall be consistent with," although some of the municipalities noted the importance of giving clear direction to decision-makers and hoped that the new language would be implemented alongside a new, more detailed and prescriptive PPS. It was suggested that the phrase be defined in both the *Planning Act* and the 2005 PPS. One municipality did not support the change in language, submitting that "shall be consistent with" is too prescriptive, and "shall have regard to" gives more flexibility while still ensuring some consideration of the PPS. In comments received by the ECO, ENGOs and members of the public wrote in support of the changes to s. 3 of the *Planning Act*.

The municipalities were somewhat supportive of the amendment allowing the government to declare a provincial interest in an OMB appeal and review that decision. However, a number of concerns were expressed by some of the municipalities. One municipality submitted that it was too short a timeframe to give notice of a provincial interest only 30 days before the hearing of an appeal begins, and that it should be declared earlier. Another municipality noted that, currently, the regions identify matters of provincial interest on behalf of the province early in the review process. In another comment, a municipality suggested that the province should consult with the municipality involved in determining whether there is a provincial interest. Most ENGOs and members of the public were cautiously supportive of the province's discretion to declare a provincial interest, but urged the government to ensure that the review by Cabinet of an OMB decision be transparent, with public notice, representation before Cabinet and the provision of written reasons with Cabinet's decision. One ENGO, however, argued against the ability of the government to declare a provincial interest, suggesting that it would effectively move the matter from a technical or legal process into a political process.

The restriction on appeals of area of settlement boundaries not supported by the municipality did receive support from the municipalities who commented under the *EBR*, although some were concerned that this would also restrict appeals by the decision of an upper tier municipal government not to approve an area of settlement boundary expansion by a lower tier municipality. Comments provided to the ECO from members of the public and ENGOs also supported this amendment.

The extension of time periods allowed before municipalities must make decisions on applications or hold public hearings was favoured by must municipalities. However, a number of municipalities emphasized the importance of providing a better definition of a "complete application" than is currently in place in the *Planning Act*. The current definition only requires that basic information be provided to constitute a complete application, and the municipalities submitted that it should reflect the need of municipalities to receive all required supporting documents and technical studies before the processing of an application must begin. Comments from ENGOs and members of the public supported both the extension of time periods and the need for a more stringent definition of a "complete application."

SEV

In May 2005, MAH provided the ECO with documentation that it considered its Statement of Environmental Values (SEV). MAH uses an "environmental significance test form" to evaluate its SEV. The main purpose of this form is to assess whether a proposal is environmentally significant and if it should be placed on the Environmental Registry for public comment. This means that the form was completed before the proposal notice for the SCA was posted on the Registry. However, the *EBR* states that MAH must consider its SEV in reaching a decision.

Although this form does mention the ministry's SEV, it is limited to a template format in which 'yes' or 'no' boxes are checked. This simplistic approach provides little or no pertinent information to the ECO or the public in how the ministry's SEV was considered in reaching a decision. While this form may serve a useful purpose internally for MAH in determining if an environmentally significant proposal should be placed on the Environmental Registry, it does not constitute a SEV consideration as required in the *EBR*.

The ECO has criticized MAH on this issue in the past. In the Supplement to the 2001/2002 annual report, the ECO observed that "the process of SEV consideration seems to be confused at MAH. Currently, the ministry partially considers its SEV as part of a checklist when deciding if a proposal is one that should be placed on the Environmental Registry. While this thoroughness is appreciated, MAH's SEV is supposed to be meaningfully considered in making the ultimate decision on a proposal, in keeping with the ministry's obligations under the *EBR*. The ECO has contacted MAH about this matter and is optimistic that MAH will revise its SEV consideration procedures in the 2002/03 reporting period." As demonstrated by the SEV documentation, it appears that MAH has made no progress in the last three years in revising its SEV consideration procedures.

Other Information

The regulation under the *Planning Act* that deals with transitional issues related to the *SCA* is described above. This transitional regulation was posted as a proposal on the Registry on November 4, 2004 with a 30-day comment period (Registry notice RF04E0001). Four written submissions were received on the proposal. O. Reg. 385/04 was made on December 9, 2004 and a decision notice was posted on March 2, 2005. It has been amended by O. Reg. 63/05 which was posted on the Registry as notice RF05E0001. There will be no separate decision review of these regulation notices.

As noted above, MAH has undertaken further consultation on the possibility of additional reforms to the *Planning Act*, beginning with the discussion paper released in June 2004.

For information on other Planning Reform initiatives undertaken during the reporting period, see articles on the Provincial Policy Statement (pages 135-151 of this annual report Supplement) and on the *Greenbelt Act* and Greenbelt Plan (pages 117-135).

ECO Comment

The ECO commends MAH for bringing forward these much-needed amendments to the *Planning Act*. The *SCA* has the potential to strengthen the roles of both the provincial government and of municipal governments in different aspects of Ontario's land use planning process.

The change in language to "shall be consistent with" is more prescriptive than "shall have regard to" in directing decision-makers to apply the 2005 PPS in planning decisions. This means that provincial policy is likely to be applied more reliably in planning decisions, and provincial interests given priority. However, the significance of the "shall be consistent with" language will depend a great deal on the substantive policies in the 2005 PPS. As discussed in the ECO's review of the 2005 PPS (see this Supplement, pages 135-151), there is some evidence that the policies in the 2005 PPS may not be strongly worded enough to protect the environment and natural heritage values along with the other provincial interests expressed there.

Also, given that the "shall be consistent with" language is not as restrictive as "shall conform to," there may still be some uncertainty about its application. Decision-makers will inevitably face situations that require them to resolve conflicts between different policies in the 2005 PPS, or between provincial policy and other factors that must be considered. The Ontario government should consider issuing additional guidance as to how these competing interests should be balanced and prioritized by decision-makers.

The amendments allowing the government to declare a provincial interest in an appeal before the OMB and to review the OMB's decision on that appeal should assist the government in circumstances where it believes it must act to protect the public interest from being adversely affected. The added requirement that the government provide the general basis for its opinion that the provincial interest is adversely affected will help to ensure some transparency.

The changes in the *SCA* that restrict appeals related to urban settlement area boundaries should be very beneficial to municipalities that have had to spend money and resources to defend their approved official plans at the OMB. Limiting such appeals is a reasonable measure to prevent developers from seeking the addition to or expansion of area settlement boundaries unless the municipality supports the changes.

The extended time periods that will now be allowed before planning applications can be appealed to the OMB will give municipalities more time to engage in meaningful consideration of these applications. They will also ensure that the public has not more opportunity to fully participate in the planning process. The ECO urges MAH to consider amending the definition of a "complete application" to require that detailed information be provided to municipalities, including supporting documents and technical studies, before municipalities must begin processing an application.

MAH provided a sufficient period of time for public comment on the Environmental Registry, and offered the public a number of additional opportunities to provide input. Although there was a delay in posting the decision notice on the *SCA*, MAH did provide an adequate summary of the comments it received and its response.

MINISTRY OF NATURAL RESOURCES

Review of Posted Decision:
Aquaculture Policies and Procedures

Decision Information:
Registry Number: PB00E6001
Proposal Posted: 2000/02/04
Decision Posted: 2004/08/24
Comment Period: 75 days (extended from 45)
Number of Comments: 14
Decision Implemented: August 2004

Description

In August 2004, the Ministry of Natural Resources (MNR) finalised ten new policies related to aquaculture – the farming of fish, shellfish and aquatic plants in natural or man-made bodies of water. These policies set out MNR's framework for licensing the aquaculture industry under the *Fish and Wildlife Conservation Act*, and for overseeing related activities, such as harvesting wild fish for aquaculture or importing aquaculture stocks from outside Ontario. The stated goals of the aquaculture policies are to protect the aquatic ecosystem, and to allow for ecologically sustainable growth in the aquaculture industry.

The ministry considered eight of these ten policies to be environmentally significant, and posted a proposal on the Environmental Registry in February 2000 for public consultation on these policies. They are:

- "Aquaculture Policy Statement" (FisPo.9.1.1), an overarching policy that sets out MNR's approach to managing aquaculture;
- "Issuance of Aquaculture Licence, Renewals, Transfers, Amendments, Refusals and Cancellations" (FisPp.9.2.1), which describes the rationale for requiring a licence to culture (grow) and sell fish, and provides a step-by-step procedure to MNR staff for issuing licences. This policy applies to all aquaculture operations in Ontario, with some exceptions for the aquarium trade and for private ponds not being used for commercial purposes;
- "Aquaculture on Private Land – Conditions of Licence" (FisPp.9.2.3), which is specific to operations on private (not Crown) land. This policy explains the licensing conditions that allow a particular species to be grown at a specified location. Some provisions, such as the requirement to report certain diseases to MNR, are already set out in regulations and are not to be restated as licence conditions, but this policy indicates that licence conditions may be used to add or strengthen provisions (e.g. requiring testing for a disease of known concern). Licence conditions also, for example, set the threshold number of fish that can escape before the escape must be reported to MNR, and may set out pre-approved methods for recapturing escaped fish;
- "Risk Analysis and Facility Security" (FisPp.9.2.5), which lists the species eligible for use in Ontario aquaculture, and presents a decision-making template to assess the risk that fish escaping from an aquaculture facility could pose to the surrounding environment. It sets out different levels of "facility security" or escape prevention that will be required, depending on the level of risk. This policy applies for any facility that requires a licence, whether it is on Crown or private land;
- "Issuance of a Licence to Stock Fish in Ontario Waters" (FisPp.9.3.1) which sets out the procedure for MNR to issue the licence that is required, under the Ontario Fishery Regulations of the *Fisheries Act* of Canada, to stock (deposit) live fish into any waters other than non-commercial artificial ponds;
- "Artificial Waters (ponds) and Application of Ontario Fishery Regulations" (FisPo.9.4.1), which applies specifically to artificial ponds that are sufficiently isolated from natural waters to make fish escape very unlikely, describes conditions under which the pond owner is allowed non-commercial fishing rights without an aquaculture licence or sport fish licence;

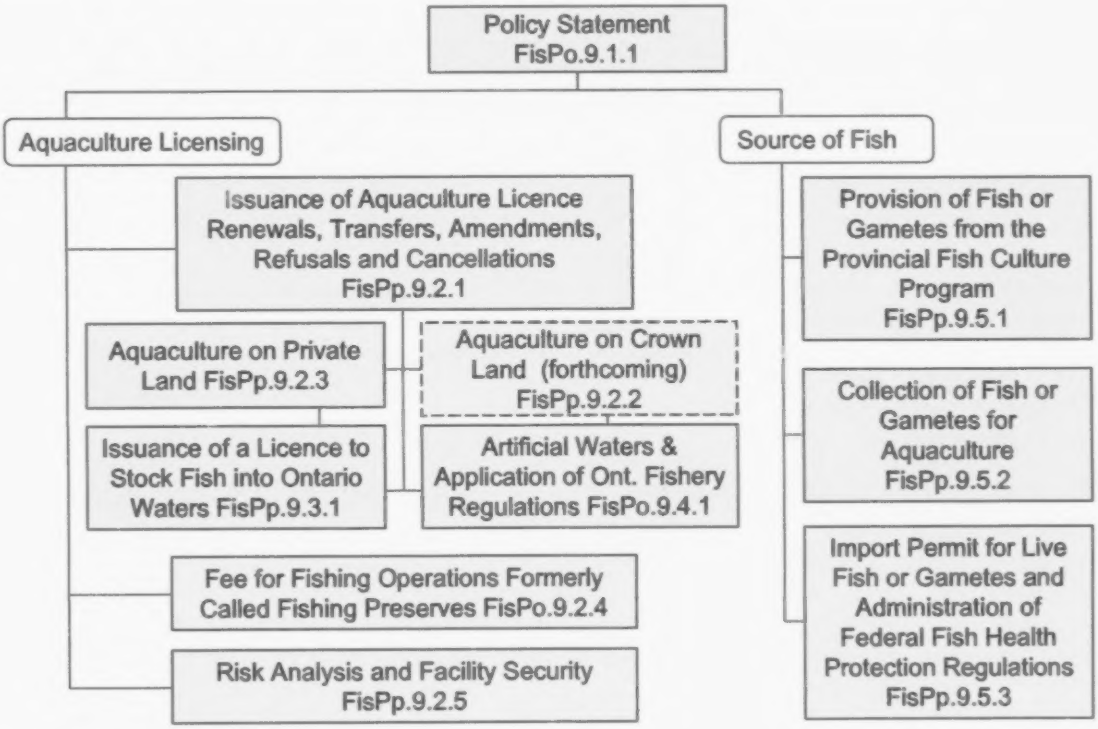
- "Collection of fish or gametes / Issuance of Licence to Collect Fish for Aquaculture" (FisPp.9.5.2) which applies to aquaculture operators collecting wild fish or fish eggs from Ontario waters to stock their operations, sets out some criteria and a general process for MNR to issue the required licences. The policy notes that MNR encourages the use of wild stocks rather than imported fish to stock aquaculture operations, but prefers that aquaculture become self-sufficient instead of depending on the ongoing collection of wild fish or eggs; and
- "Administration of Federal Fish Health Protection Regulations with respect to the importation of live fish or gametes into Ontario" (FisPp.9.5.3) which guides MNR's administration of regulations under the federal *Fisheries Act* that are designed to prevent importing infectious fish diseases when importing fish and fish eggs into Ontario. This policy applies only to species defined under the federal regulation, primarily to salmonid fish such as rainbow trout. It also addresses Ontario's commitment to abide by the Great Lakes Fish Health Committee agreement.

The two additional policies not posted to the Registry, but also released in August 2004, are:

- "Provision of Fish or Gametes from the Provincial Fish Culture Program" (FisPp.9.5.1) which provides a process for aquaculture operators to buy excess fish or gametes from MNR's own fish culture stations, when MNR has fish excess to its needs and an aquaculture operator wants new stock of that species; and
- "Licensing of fee for fishing operations (formerly called Fishing Preserves)" (FisPo.9.2.4) which indicates that such operations, which grow fish and charge a fee for fish removed, are now to be regulated as aquaculture operations and require the standard aquaculture licences.

According to the MNR Aquaculture Policy Statement, Ontario's aquaculture policy structure in fact consists of eleven policies, not ten (see Figure 1, below). The eleventh is "Aquaculture on Crown Land" (FisPp.9.2.2), which applies primarily to cage aquaculture in the waters of the Great Lakes (these are the aquaculture operations that produce the majority of cultured fish in Ontario). The Aquaculture on Crown Land policy was not released in draft form along with the other aquaculture policies in 2000, and was not issued in August 2004 when the others were finalised. As of August 2005, no such proposal has yet been posted to the Environmental Registry. For more on cage aquaculture, refer to pages 133-137 of the ECO's 2004/2005 annual report. See also "Cage Aquaculture: A Persistent Footprint" on page 85 of that report.

Figure 1— Aquaculture Policy Structure
Based on Appendix 1 of MNR's Aquaculture Policy Statement (FisPo.9.1.1), 2004:


Policy Statement FisPo.9.1.1
Aquaculture Licensing
Source of Fish
Issuance of Aquaculture Licence Renewals, Transfers, Amendments, Refusals and Cancellations FisPp.9.2.1
Aquaculture on Private Land FisPp.9.2.3
Aquaculture on Crown Land (forthcoming) FisPp.9.2.2
Issuance of a Licence to Stock Fish into Ontario Waters FisPp.9.3.1
Artificial Waters & Application of Ont. Fishery Regulations FisPo.9.4.1
Fee for Fishing Operations Formerly Called Fishing Preserves FisPo.9.2.4
Risk Analysis and Facility Security FisPp.9.2.5
Provision of Fish or Gametes from the Provincial Fish Culture Program FisPp.9.5.1
Collection of Fish or Gametes for Aquaculture FisPp.9.5.2
Import Permit for Live Fish or Gametes and Administration of Federal Fish Health Protection Regulations FisPp.9.5.3

Background

Aquaculture in Ontario takes a number of forms. There are approximately 190 aquaculture operations licensed by MNR. Some operations are fed by groundwater, or by pumping water from a nearby stream or river. These "land-based" facilities may be dug ponds, former gravel pits or abandoned mines, circular tanks or rectangular concrete raceways. Other, typically much larger aquaculture operations grow fish in cages (or "net pens") floating in open water. In Ontario, such "cage aquaculture" is often located in the Great Lakes. A popular location is the Georgian Bay of Lake Huron. While MNR allows the culture of 38 types of fish, the dominant species in Ontario aquaculture is rainbow trout, accounting for 95 per cent of the harvest and over 4,000 tonnes of fish per year. Approximately 80 per cent of farmed rainbow trout is grown in cage operations in Georgian Bay. The federal government is actively promoting the growth of this industry.

MNR's Aquaculture Policy Statement lists a number of potential ecological impacts of aquaculture, most of which relate to the impacts that fish may have if they escape from the aquaculture facility: ecological harm through introduction of farmed fish that are not indigenous to the area, or through stocking too many fish in a water body; loss of genetic fitness of indigenous fish through interbreeding with farmed fish; spread of fish pathogens to natural populations; overharvesting of wild fish to stock aquaculture operations; and loss or degradation of fish habitat.

Of the different types of aquaculture operation, cage aquaculture has proven the most controversial. Some stakeholders contend that cage aquaculture operations cause serious environmental impacts, not only because of their size, but because or their structure, suspended in open water. Cages are subject to both 'leakage' and 'spilling' of fish – both occasional fish escapes, and larger releases if storm events or animal attacks disrupt the cage. They are also potential sources of water quality impacts, because instead of collecting and treating wastes, cage facilities typically rely on the free movement of water through the netting to carry away fish manure, uneaten feed or other wastes.

Regulatory Framework

MNR is the lead ministry for regulating aquaculture, under the authority of the *Fish and Wildlife Conservation Act*, the *Public Lands Act*, and the federal *Fisheries Act*. MNR's responsibility for aquaculture falls largely within its responsibility for management of fisheries resources and protection of wild fish, as well as for protection of ecosystems. As described below, a number of other agencies are also involved in regulating or promoting aquaculture.

MNR's aquaculture policies address several types of licences that are required by O. Reg. 664/98 (Fish Licensing) under the *Fish and Wildlife Conservation Act*. The regulation requires aquaculture operators to obtain a licence from the ministry to culture, buy and sell fish. The aquarium trade is exempted from this requirement: growing fish in aquariums for personal use or for the pet or hobby market does not require an aquaculture licence. Other aquaculture-related licences required under O. Reg. 664/98, and addressed in MNR's aquaculture policies, are for stocking fish, and for collecting fish from Ontario waters.

The suite of aquaculture policies is also designed to address other aquaculture-related requirements of O. Reg 664/98 (Fish Licensing). Under the regulation, aquaculture operators are required to report fish diseases to the ministry, and report fish escapes above some threshold set on the licence. The MNR aquaculture policies guide the administration of these requirements. Operators are also required by the regulation to monitor the water quality impacts of their operations, if they are culturing fish in cage aquaculture on public land (e.g. in the Great Lakes). As noted, the MNR policy on such cage aquaculture (Aquaculture on Crown Land) has not been released.

Other licences required under O. Reg. 664/98 (Fish Licensing) are not related to aquaculture, and not addressed in the aquaculture policies. These include licences for commercial fishing, sport fishing, and commercial bait harvesting and sale.

The *Environmental Assessment Act* (*EAA*) applies to some aspects of aquaculture, such as approvals to use the waters over Crown land for aquaculture, and licences to collect fish from Ontario waters for use in aquaculture.

The Ministry of the Environment, which is the lead ministry responsible for protecting water quality, also plays a role. For example, MOE staff provides advice to MNR on what water quality monitoring conditions to include on cage aquaculture licences. For land-based aquaculture, MOE issues permits to take water, and certificates of approval for treating fish wastes (both under *the Ontario Water Resources Act* and its regulations). The Ontario Ministry of Agriculture and Food, which both regulates and promotes the farming industries of Ontario, also plays a role in aquaculture. It supports scientific research to meet the needs of the aquaculture industry. The Ministry of Northern Development and Mines has been involved in promoting aquaculture as an economic opportunity in northern Ontario. The federal Department of Fisheries and Oceans (DFO) is also involved in several aspects of aquaculture in Ontario, including setting fish health protection standards, and conducting aquaculture science research and dissemination. DFO is also involved in preventing the spread of aquatic invasive species. The Department worked with the provinces to develop, in 2001, a National Code on Introductions and Transfers of Aquatic Organisms, which Ontario adopted in 2003.

MNR's New Aquaculture Policies

MNR's Aquaculture Policy Statement (FisPo.9.1.1) describes MNR's interest in "ensuring that aquaculture in Ontario continues to develop in an ecologically sustainable manner." Under the *Fish and Wildlife Conservation Act*, the ministry issues aquaculture licences, which are valid for a five-year term, and for the particular species and location named on the licence. At the end of a five-year period, the aquaculture operator must re-apply for a new licence.

Two key documents within the policy suite are Risk Analysis and Facility Security (FisPp.9.2.5), and Issuance of Aquaculture Licence, Renewals, Transfers, Amendments, Refusals and Cancellations (FisPp.9.2.1). These policies provide a process for determining what species may be cultured at a location and what levels of escape prevention must be in place, and set out the steps to be followed in issuing a licence.

Ecological Risk Analysis and the "Short Form"

A central element in the aquaculture policy framework is the risk analysis set out in the Risk Analysis and Facility Security policy. In order to obtain a licence, the applicant fills out the Short Form Risk Analysis, providing information on the species proposed for culture, the receiving waters (waters that would receive any escaped fish), and local species present in these receiving waters. The risk analysis is designed to determine what effect escaped fish might have on the ecology and genetics of the fish that live in the receiving waters. If the species proposed for aquaculture is also present in the receiving waters, the applicant must classify the local stocks in terms of their genetics. "Special native stocks" –threatened species or sub-species, or stocks that have been genetically isolated for a long time and are considered rare, unique, or locally adapted – require the most protection from potential interbreeding with aquaculture escapees.

Depending on the potential impact, a minimum allowable security level (high, medium or low security) is established, and security requirements defined in the policy are written into the aquaculture licence. High security facilities are operations that have multiple barriers to fish escape and a very low risk of escapement. They are required in situations where fish in the receiving waters – threatened species, remnant native stocks, etc. – are most likely to be harmed if farmed fish escape. They are also required if the proposed species for aquaculture is not present in the receiving waters, to reduce the risk of introducing a non-native species into the receiving waters.

In contrast, in low security facilities a single-barrier system limits fish escape into Ontario waters. Examples include earth ponds on a regional flood plain, and floating cages in a lake. The policy recognises that for such facilities "losses are inevitable," noting the potential for large numbers to escape due to storms or floods. The ecological risk analysis does not focus on other potential impacts besides fish escapement. For example, it does not address ecological risks from pollution of the receiving waters by fish feces, uneaten feed, or pharmaceuticals and dyes administered to the fish.

For aquaculture on private land, the Risk Analysis and Facility Security policy establishes that the risk assessment will rely on a "Short Form Risk Analysis" for most applications, rather than a "Detailed Ecological Risk Analysis." The detailed analysis will only be carried out in exceptional circumstances: in the rare case that the ministry believes the level of facility security determined by the Short Form is not enough to protect a particularly vulnerable species in the receiving waters; or if the applicants have reason to argue that the species they propose should be allowed in a lower-security facility than the level required under the Short Form.

The Detailed Ecological Risk Analysis is based on the risk analysis described in the National Code on Introductions and Transfers of Aquatic Organisms, which Ontario adopted in 2003. It requires detailed information on the proposed species, and on the receiving ecosystem, to determine what detrimental impacts fish escapes might have on the ecosystem. Proponents must provide information to demonstrate whether escaped fish might compete with or prey on native species, whether they could have genetic impacts on local stocks (e.g. through hybridization), and whether they might alter the habitat in the receiving waters, or introduce new diseases.

For cage aquaculture in waters over Crown land (e.g., in the Great Lakes), the Risk Analysis and Facility Security policy indicates that the Short Form Risk Analysis is to be used as an initial screening process, then followed by a more detailed review. However, the policy document to guide such a review (Aquaculture on Crown Land) has not yet been issued.

Environmental Assessment Act and the Environmental Bill of Rights

Compared to the draft policy proposed in 2000, the new Issuance of Aquaculture Licence, Renewals, Transfers, Amendments, Refusals and Cancellations policy (FisPp.9.2.1) provides more detailed guidance on the steps MNR staff follow in issuing a licence. It also documents how MNR will interpret *EAA* provisions. As a starting point, MNR asserts that an aquaculture operation is not a disposition of rights to Crown land, since water is not owned by the Crown. However, if a land use permit is issued under the *Public Lands Act* or if the operation includes all of the water of a natural pond or lake, the Class Environmental Assessment for MNR Resource Stewardship and Facility Development Projects (2002) will apply. For example, cage aquaculture in waters over Crown land (e.g., in the Great Lakes) requires a land use permit and will be subject to a Class Environmental Assessment.

Issuance of Aquaculture Licence, Renewals, Transfers, Amendments, Refusals and Cancellations also discusses the requirements for public consultation on the Environmental Registry when issuing aquaculture licences. Under a 2001 revision to the *EBR* Classification of Proposals for Instruments Regulation (O. Reg. 681/94), MNR is required to post a proposed aquaculture licence for full consultation on the Registry only in two circumstances: (a) if the applicant is required to submit a Detailed Ecological Risk Analysis, or (b) if the licence is for cage aquaculture in waters over Crown land (e.g., cage aquaculture in the Great Lakes).

For cage aquaculture in waters over Crown land, however, the Issuance of Aquaculture Licence policy invokes an exception under section 32 of the *EBR*. Section 32 excuses ministries from *EBR* public consultation and appeal provisions, if an instrument (such as an aquaculture licence) is part of a project approved under the *EAA*. For applications for cage aquaculture on Crown land, MNR's new policy will treat the aquaculture licence as a step towards implementing an undertaking under the *EAA*. Such projects will be screened through an MNR Class Environmental Assessment (the MNR Class EA for Resource Stewardship and Facility Development Projects) instead of being posted for full consultation through the Environmental Registry. MNR will post an information notice with comment period on the Environmental Registry, rather than posting a regular proposal notice.

The ECO reviewed the information notices posted on the Registry between August 2004 and March 2005 for Great Lakes cage aquaculture licences screened under the Class EA. Of the five information notices, three indicated that the application was screened as "Category A", one as "Category C", and one notice did not specify, although upon inquiry, the ECO was informed by MOE that it too was screened as "Category A". Category A applications are those which MNR judges as having potential for low environmental impacts and low public and agency concern, and allows to proceed without public review. Category C projects are those the ministry considers to have medium to high potential negative environmental effects or public concern, and these trigger a more detailed review by MNR.

Other Approvals

The Issuance of Aquaculture Licence, Renewals, Transfers, Amendments, Refusals and Cancellations policy notes that a number of other licences and approvals may be required by an aquaculture operator, beyond those under MNR's jurisdiction: permits to take water and effluent treatment certificates of approval from the Ministry of the Environment, approval from Conservation Authorities for facilities in flood plains, zoning approvals from municipalities, and approvals from the Canadian Coast Guard for cage operations in navigational waterways. MNR will not withhold the aquaculture licence pending other approvals, but will inform the applicant of any approvals required from MOE and notify MOE when a licence has been issued.

Site Visit

The step-by-step procedure for issuing licences set out in the 2000 draft of the Issuance of Aquaculture Licence, Renewals, Transfers, Amendments, Refusals and Cancellations policy included a site visit from MNR technical staff to the facility, to confirm the facility security information provided by the applicant before issuing the aquaculture licence. This step has been removed from the final policy. The document does indicate that MNR should inspect the facility after the licence has been issued, to determine that the conditions on the licence are being followed. However, it notes that the minimum inspection frequencies it provides, ranging from once per year for high security facilities, to once during the five-year licence term for low security operations, are only "suggested" inspection frequencies and not requirements.

Implications of the Decision

The ministry consulted, and eventually issued decisions, on an incomplete set of aquaculture policies. Even though the majority of the fish farmed in Ontario are produced in Great Lakes cage aquaculture operations, the process to license these facilities, and to assess and mitigate related ecological risks, is not provided in the existing suite of aquaculture policies. The existing policies do not confirm that MNR, in setting licence conditions on cage aquaculture operations, is including water monitoring conditions and water quality protection conditions recommended by MOE. No information is provided on what is currently guiding the risk analysis and facility security determination for such facilities. Great Lakes cage aquaculture continues to be practiced in Ontario, licences continue to be issued, and these policy documents do not explain what the *de facto* policies are for regulating the industry. MNR is deferring public consultation and public decisions on how to regulate this most contentious, and potentially most environmentally significant, sector of the aquaculture industry.

Public Consultation on Aquaculture Licences

In September 2001, MNR completed work on its instrument classification regulation (for a review, see the ECO 2001/2002 annual report Supplement, pp. 134-142). The regulation sets out which instruments must be posted to the Environmental Registry. Whenever a licence applicant either submits a Detailed Ecological Risk Analysis, or applies for a licence for cage aquaculture in waters over Crown land (e.g., in the Great Lakes), O. Reg 681/94 (Classification of Proposals for Instruments) requires MNR to post a notice for an instrument proposal on the Environmental Registry.

However, with the new aquaculture policies, MNR makes it clear that the detailed analysis will be done only in exceptional situations. Even for cage culture in waters over Crown land (e.g. in the Great Lakes), for which the policy recognises that a Short Form Risk Analysis is insufficient as more than an initial screening, the Risk Analysis and Facility Security policy indicates that some unspecified additional analysis will be done. It does not state that a Detailed Ecological Risk Analysis will be required.

For cage aquaculture in waters over Crown land, MNR's 2004 policies invoke section 32 of the *EBR*. Section 32 offers an exception to the requirement to post an instrument for consultation, when the instrument is part of an undertaking approved by a decision under the *EAA*. Thus aquaculture licences for waters over Crown land, according to the 2004 aquaculture policies, are to be assessed through the Class Environmental Assessment for MNR Resource Stewardship and Facility Development Projects that was approved in 2002. Despite the clear intent and wording of O. Reg 681/94 (Classification of Proposals for Instruments), these licences will not be posted as proposals on the Environmental Registry. They will be posted as information notices, with a recommended 45-day comment period and an update when the final decision is made. There will also be no *EBR* leave to appeal rights if a decision is made under the *EAA*, and no legal obligation for MNR to consider the comments received through the information posting before making a decision.

In exempting most applications from the requirement for a Detailed Ecological Risk Assessment the ministry appears to have also greatly limited the role of the new Ontario Introductions and Transfers Committee, established to support the 2003 National Code on Introductions and Transfers of Aquatic Organisms. The policies only indicate that applications will be subject to review by the Committee in cases where a Detailed Ecological Risk Assessment is required of the applicant.

MNR Discretion in Regulating Aquaculture

Under the new policies, MNR does not conduct a facility inspection or any type of site visit prior to issuing a licence, relying instead on the information submitted by the applicant. There is no requirement for a site visit by a Conservation Officer or other ministry staff during the entire five-year duration of an aquaculture licence, only a suggested inspection frequency – essentially, whether and how often to inspect are left to MNR's discretion.

In fact, while the new aquaculture policies provide increased clarity in some areas, many matters are left to the discretion of the ministry, rather than being spelled out in these policies. Leaving much to the discretion of the ministry could in theory allow MNR some flexibility in responding to the diversity of aquaculture operations and the diversity of ecological considerations across the province. However, such a framework will only provide appropriate oversight of the industry if the ministry has well-designed and clear criteria for making decisions, and is well resourced with strong technical capacity and detailed local knowledge.

The following are examples of other areas left to the discretion of the ministry, with little indication in the policies as to how such decisions will be made:

- The ministry attaches conditions to a licence, such as the threshold of fish escapes that must be reported, and the required escape prevention measures, depending on the species and life stages being cultured and the potential impacts to receiving waters. The threshold number of escaped fish is subject to MNR's discretion.
- MNR reviews the Short Form Risk Analysis submitted by the applicant, without either consultation though a proposal notice on the Registry, or consultation with the Ontario Introductions and Transfers Committee. MNR staff decides whether, due to a "very high ecological risk," a Detailed Ecological Risk Analysis should be required despite the application having met the security requirements under the Short Form.
- Applications for a licence to collect fish and gametes from Ontario waters for use in aquaculture will be considered by MNR on a case by case basis: "local conditions and other resources users will be taken into account and stakeholders may be consulted" (emphasis added). MNR must also decide whether the applicant has demonstrated the skills to minimize impact on the natural resource while collecting the fish or gametes.
- MNR staff has discretion to offer a grace period of up to six months for applicants who have met the conditions of their existing licences but do not conform to the new Risk Analysis and Facility Security procedure; MNR staff may choose to consult the Ontario Introductions and Transfers Committee regarding an appropriate grace period.
- The Fish Culture Section of MNR, in consultation with the Ontario Introductions and Transfers Committee, is given the discretion to assess applications to have a species or hybrid added to the list of eligible species for culture in Ontario. Criteria for these decisions are not listed, and there is no provision for public consultation.

- While regulations require that fish diseases be reported to MNR, the policies do not clarify how subsequent decisions will be made. If an aquaculture operator reports a fish disease, MNR will determine what steps must be followed and, at the discretion of MNR staff, may order that the entire stock be destroyed.

Public Participation & *EBR* Process

The policy proposal was first posted on the Registry on February 4, 2000, with a 45-day comment period. Some members of the public were unable to meet that deadline, and MNR extended the comment period by an additional 30 days, to April 19, 2000, to accommodate further public response.

All eight of the policies identified by MNR as environmentally significant were consulted on through a single Registry proposal, and this proposal did not include links to the eight policy documents. Members of the public therefore had to go to greater effort to obtain the policies, and to determine which ones to comment on.

Fourteen respondents commented on the February 2000 policy proposal. Many commenters – both those concerned with promoting the industry and those concerned with protecting the environment from its potential impacts – felt that too much was left to the discretion of MNR staff in the draft documents. They suggested that the policies should more explicitly spell out conditions and processes of licensing, clarify numerous definitions, provide the risk analysis forms and criteria, indicate what actions will be taken when fish diseases are reported, and establish design standards for the different levels of facility security.

The comments calling for stronger environmental protections included requests and recommendations for: tightening the provisions for preventing, monitoring and reporting fish escapes; requiring existing facilities to meet the new standards; taking into account the cumulative impacts of multiple aquaculture operations on a water body; insuring all discharges are treated, and monitoring operating practices and discharges; discontinuing the culture of non-native species such as Arctic char in the Great Lakes; strengthening protection for genetically distinct populations of native fish species; ensuring MOE approval before MNR issues a licence; requiring aquaculture operators to post a bond which MNR could use to remediate contamination if necessary; and banning cage aquaculture operations altogether. Some comments focused on improving industry environmental performance, by mandating the use of best available technologies and creating incentives for operators to reduce their facilities' environmental impacts.

Other commenters focused on excessive "red tape" stifling the aquaculture industry, and questioned MNR's technical capacity to provide appropriate governance in terms of fish diseases, risk analysis and facility security, thresholds for reporting escapes, and other licensing conditions. Aquaculture operators commented that farmed fish were not being treated as private property, and were subject to government seizure without warrant and without compensation. They argued that the proposed policies were inequitable and inconsistent when compared with Ontario's other fish industries (aquarium trade, live food fish imports, sportfish, baitfish, etc.) and with other Ontario farming sectors. Comments also called for automatic approval of existing licences when the proposed new policies are implemented, government support for facility upgrades if necessitated by the new policies, clearer rationale for reportable thresholds of fish escape, and an independent appeal mechanism as well as compensation when licences are refused or cancelled by MNR. The ministry was advised to adopt a more cooperative stance in its dealings with the industry, and to consider the social and economic benefits as well as the potential environmental costs of aquaculture.

A common concern for many commenters was fish disease. Comments called for more monitoring of fish health, for regulating other sectors such as baitfish, and for the province to go beyond the limited, salmonid species addressed by the federal Fish Health Protection Regulations under the *Fisheries Act*.

Many disagreed with the proposal to allow importing of fish carrying diseases known to already exist in Ontario, and one commenter suggested that live fish should not be imported at all, including baitfish and food fish, because of the ecological risks.

Other responses focused on the need for public notification of all licence applications, on the need to consider First Nations' rights to fish and the potential impacts of aquaculture on these fisheries, and on the importance of consulting with neighbouring Great Lakes jurisdictions for aquaculture licensing on the Great Lakes.

Because the draft policies were released in February 2000 and the Registry proposal notice was never updated until the decision of August 2004, some changes to the final version were a result of changes to the regulatory framework in the interim years. For example, the Class Environmental Assessment for MNR Resource Stewardship and Facility Development Projects was approved by MOE in December, 2002. However, MNR failed to alert members of the public about its plan to use this Class EA to exempt certain aquaculture licence approvals (e.g., for Great Lakes cage aquaculture) from regular notices on the Registry.

In its decision notice, MNR indicated that while many respondents had found the draft policies either too restrictive or not restrictive enough, the ministry felt that its original policy direction "provides the necessary safeguards for the aquatic ecosystem and, at the same time, allows for realisation of the growth potential of the aquaculture industry in an ecologically sustainable manner."

Several new definitions and numerous clarifications are added in response to the comments submitted. For example, the Risk Analysis and Security Facility policy has added text to indicate that a different and more detailed review will be necessary for cage culture in waters over Crown lands, citing "FisPp.9.2.2 – Aquaculture on Crown Lands (when available)."

Between 2000 and 2004, the policy titled Issuance of Aquaculture Licence, Renewals, Transfers, Amendments, Refusals and Cancellations was greatly expanded. It establishes the MNR policy on Environmental Assessment and *EBR* instrument postings, and reinforces the requirement that existing facilities must fulfil all of the current requirements in order to have a licence renewed. Changes to the Issuance of Aquaculture Licence policy also provide a much more detailed process for reviewing applications including provisions for refusing licences, and indicate the mechanism for applicants to ask that a species not yet on the 'species list' be considered for aquaculture.

The Risk Analysis and Security Facility policy was also expanded, including provisions for sterile stocks, hybrid stocks, and circumstances under which MNR may make a decision more stringent than that required by the Short Form Risk Analysis. The revised policy provides much more detailed guidelines for the different classes of facility security, including a recognition that the security of a facility, and the expected losses, will depend on both the species and life stage(s) being cultured. The revised policy also reflects a strengthening of conservation priorities, listing "time of genetic isolation, uniqueness and rarity" as the factors for consideration when conserving genetic diversity of fishes, while "socio-economic and aesthetic value" have been removed from the list. However, the policy weakens public consultation and ecological protection provisions by establishing that the Detailed Ecological Risk Analysis will seldom be employed.

SEV

The Ministry provided a summary of how its Statement of Environmental Values was considered in this decision. Protection of the ecosystem from potential adverse effects of fish farms on native fish is a central element of the aquaculture policy. The ministry describes the goal of regulating aquaculture "in a manner providing for ecologically sustainable growth," and the supporting objectives it lists are the long-term health of ecosystems, and the continuing availability of natural resources.

Other Information

For a review of MOE's response to an application for review of cage aquaculture policies, see pages 133-137 of the 2004/2005 annual report and pages 232-241 of this Supplement.

ECO Comment

After years of uncertainty about the status of its aquaculture policies, the ECO was pleased to see MNR announce a decision on its suite of aquaculture policies. For years, the aquaculture industry has been asking the Ontario government to provide clearer direction. However, the failure to address cage aquaculture in waters over Crown land (e.g., in the Great Lakes) is disappointing, as this represents the majority of fish cultured in Ontario, presents the highest environmental risk through both fish escapes and water quality degradation, and is the most controversial form of aquaculture. MNR, with the participation of MOE, continues to regulate the cage aquaculture industry with interim policies and procedures ("working protocols" and "draft processes"), which have not been subject to public consultation through the Environmental Registry and are only available by request. The ECO urges the ministry to formalise these policies through a fully consultative process.

The ECO reminds the ministry that proposals should not languish on the Registry for years, and should be followed up with either a decision notice or an update. In this case, as MNR was not ready to post a decision for several years, it would have been appropriate to instead issue interim updates and provide an opportunity for public comment on the significant new provisions introduced into the final policies. The ECO also encourages the ministry to post separate notices for each policy proposal, and to provide a link from the Registry notice to the draft policy. This makes it easier for the public to comment. It also makes it simpler for the ministry to explain how its Statement of Environmental Values was considered for each policy, to explain how comments were considered, and to post each policy decision as it is finalised instead of delaying the decision notice on all policies because of a delay in any one.

The stated goal of MNR's aquaculture policies is to ensure that aquaculture "continues to develop in an ecologically sustainable manner." The ministry cites desired outcomes such as protecting the long-term health of our ecosystems, and ensuring that degraded environments are restored or rehabilitated. The focus of the aquaculture policies is on fish escapement and the potential impacts on wild fish, which are valid concerns. However, other environmental risks, such as impacts to water quality and sediment, are not examined in the risk assessment process. Other potentially affected organisms, such as aquatic plants and benthic (bottom-dwelling) animals, are not given due consideration. There are no clear provisions to restore or rehabilitate environments degraded by fish farming. The ECO urges MNR to address the range of environmental risks and impacts of aquaculture, in collaboration with MOE and other interested agencies.

The current policies also leave it to the aquaculture operator to obtain the approvals that might be necessary from MOE, the Canadian Coast Guard, and local municipalities or conservation authorities. Whereas MNR's policies are designed to focus on guiding MNR staff and addressing that ministry's primary concerns – such as protecting wild fish stocks – there is still a need for MNR, as lead ministry, to work with MOE and other interested ministries and agencies to develop a more integrated and comprehensive aquaculture policy for the province.

Under Ontario's Fish Licensing Regulation, O. Reg 664/98, the aquarium trade is largely exempt from these aquaculture policies. Yet the risk of ecological impacts from species introductions, a primary concern driving the aquaculture policies, is also a risk of the aquarium trade. The risk assessment principles in Ontario's aquaculture policies could also be adapted for the aquarium industry, to limit the trade in ornamental species capable of invading Ontario waters and thus prevent such unintended introductions of non-native species.

The aquaculture policies rely heavily on self-reporting by aquaculture operators. Without a site visit prior to issuing a licence, with only a guideline recommending infrequent inspections (every one to five years), and with no provisions for government monitoring of operational processes and environmental impacts, both legal violations and environmental impacts could go undetected.

By relying on section 32 of the *EBR* and applying its 2002 Class Environmental Assessment, MNR has ensured that applications to culture fish in waters over Crown land (e.g. cage aquaculture in the Great Lakes) will not be subject to the notice and comment provisions of the *EBR*. The ECO is disappointed that MNR is ignoring the spirit of the *EBR* and failing to provide full public consultation on these aquaculture licences, despite growing public interest and despite the clear intent of O. Reg. 681/94 (*EBR* Classification of Proposals for Instruments). In fact, after these policies were implemented in August 2004, four of the first five licenses screened through a Class EA rather than an *EBR* instrument proposal were waved through the EA process without any further study or public consultation. If MNR chooses to exempt Great Lakes cage aquaculture from the *EBR* instrument posting requirement, the ECO urges the ministry to do so in a transparent and accountable manner: by revising the instrument posting requirement in O. Reg. 681/94, after full public consultation regarding this revision.

The new aquaculture policies leave many important environmental matters up to the discretion of MNR staff when issuing and enforcing aquaculture licences. Full transparency, and full and early public consultation in decisions, could be of great help in ensuring that local ecological issues are appropriately addressed.

Review of Posted Decision:
Amendment of Regulations under the *Fish and Wildlife Conservation Act, 1997* to Enhance Wolf Conservation

Decision Information:

Registry Number: RB04E6012	Comment Period: 40 days
Proposal Posted: November 25, 2004	Number of Comments: 871
Decision Posted: March 10, 2005	Came into Force: April 1, 2005

Description

In March 2004, the Ministry of Natural Resources (MNR) announced a suite of commitments to conserve Ontario's two species of wolves – gray wolves and eastern wolves. These commitments included the development of a "proper wildlife management program for Ontario's wolves" to "ensure that Ontario gets the vital scientific information it needs to protect and manage wolves." These commitments represent a significant shift in wildlife management practices in Ontario, as the province had historically treated wolves as vermin and offered a bounty on them as recently as 1972.

Though both gray wolves and eastern wolves are recognized as keystone species because of their disproportionately important role as top predators in the functioning of ecosystems, little data exist on their populations and ranges across Ontario. Additionally, the number of eastern wolves is low enough – due to the loss of habitat and pressures from hunting – for them to be considered a species at risk. According to MNR's estimates, trappers harvest 300-500 wolves a year and hunters kill 500-1,000 wolves a year. Harvest reports do not distinguish between eastern wolves and gray wolves.

It is estimated that eastern wolves have lost 58 per cent of their historical range in Canada and are now extirpated from the Atlantic provinces and the eastern United States. The highest population densities of eastern wolves are reportedly found in southwestern Quebec and southeastern Ontario, particularly in Algonquin Provincial Park. Monitoring programs have never been conducted to accurately determine their numbers across Ontario as a whole and MNR's recent population estimates disturbingly vary from 900 to 1,600.

The eastern wolf is legally designated as a "species of special concern" under the federal *Species at Risk Act*. When a species is designated as being of special concern, it is considered to have characteristics that make it sensitive to human activities or natural events. MNR also has designated it as a species of special concern in ministry policy, but Ontario's *Endangered Species Act* does not grant protections to the species (see pages 148-152 of this year's annual report).

The gray wolf is found in northern Ontario. Gray wolves have a larger build than eastern wolves, which are more like coyotes in appearance. MNR has never attempted to comprehensively assess the number of gray wolves in Ontario, but the ministry speculates that there are approximately 7,200. Gray wolves are not considered to be a species at risk by either the federal government or MNR.

As an initial step, the ministry proposed a number of regulatory measures for wolves in selected wildlife management units in central and northern Ontario intended to control their harvest, to provide a mechanism for the ministry to collect vital information, and to enable the ministry to make future conservation decisions. This proposal extended the same regulatory measures to coyotes within wolf range, because in large areas of the province the range of the two species overlap and coyotes are very difficult to distinguish from wolves, especially eastern wolves. MNR's proposals included:

- Requiring a wolf/coyote game seal, in addition to requiring a small game licence;
- Establishing a limit for each hunter of two wolves or coyotes per hunter per year;

- Establishing a wolf game seal fee for residents at $10.00 per seal and for non-residents at $250.00 per seal;
- Establishing a closed wolf/coyote hunting and trapping season;
- Requiring mandatory reporting of wolf/coyote hunting activity and harvest; and
- Requiring that these new regulations apply in wildlife management units in central and northern Ontario within wolf range.

In March 2005, MNR followed through with parts of this proposal, establishing a closed hunting and trapping season for wolves and coyotes. By amending O. Reg. 670/98 (open seasons) under the *Fish and Wildlife Conservation Act* (*FWCA*), the closed season will take effect from April 1 to September 14 of each year in 67 wildlife management units. The closed season does not cover southern Ontario and it does not restrict the protection of livestock by farmers. The ministry also announced that it plans to establish a wolf advisory committee in December 2005 "to review additional wolf information as it becomes available."

As of March 2005, the ministry had not reached a decision on requiring a wolf/coyote game seal and annual mandatory reporting, but it did state that these measures were still under consideration. According to the ministry, a decision on all aspects of the proposal was delayed as MNR was required to obtain the approval of Management Board for the proposed fees associated with the game seals. It is MNR's intent that a decision will be reached sometime later in 2005 on these aspects of its proposal.

Implications of the Decision

Hunting wolves, which are designated as furbearing mammals under the *FWCA*, requires a valid Outdoors Card and a small game licence. Small game licences already were not valid from June 16 to August 31 each year, in the parts of Ontario lying north and west of a line from Georgian Bay to the Ottawa River. Therefore, the new closed season effectively doubles the time period that it is prohibited to hunt wolves in central and northern Ontario. Raccoons, red foxes in northern Ontario, arctic foxes, gray foxes, weasels, and opossums currently all have more restrictive closed seasons than those for wolves. The only furbearing mammals with less restrictive closed seasons are red foxes in southern Ontario and skunks.

The changes to the open seasons for wolves and coyotes does not limit a farmer's authority under the *Fish and Wildlife Conservation Act* to protect livestock by killing a predator. The only direct effect on farmers would be that such killings must be reported. Further, farmers or members of their family are allowed to hunt and trap without a licence on their farm property. Farmers also may seek compensation for any livestock or poultry that are killed by a wolf or a coyote under the authority of the *Livestock, Poultry, and Honeybee Protection Act*.

It is difficult to distinguish visually between eastern wolves and coyotes because of their physical and behavioural similarities. Therefore, not protecting both species from hunting and trapping risks the accidental deaths of eastern wolves. It is for this reason that MNR has established a closed season for both wolves and coyotes in central and northern Ontario. Further, if the closed season had not included coyotes, the measures to protect wolves likely would have been legally unenforceable. Coyotes predominately inhabit southern Ontario, where the new closed season does not apply.

Public Participation & *EBR* Process

MNR posted a proposal notice on the Environmental Registry with a 40-day comment period. The ministry received 871 comments, including 657 form letters. According to the ministry, the comments generally offered support for the proposal as an initial step in improving wolf conservation, but specific concerns were expressed regarding the timing and geographic coverage of the closed season.

The Ontario Federation of Anglers and Hunters (OFAH) generally was supportive of the MNR's proposal, but it did raise several concerns including questioning the need for bag-limits. However, the OFAH stated that "it is clearly desirable for the Ministry to collect total wolf harvest/mortality data from hunters and farmers to augment what is already known about trapper harvest of wolves, so that the Ministry can demonstrate and/or ensure that these activities are sustainable." OFAH also suggested several minor amendments to the wildlife management units that would be included in the closed season, which the ministry did in fact change, as well as suggesting a slightly shorter closed season.

The Ottawa Valley Chapter of the Canadian Parks and Wilderness Society (CPAWS) was supportive of the ministry's proposal as a first step toward wolf conservation, but it raised numerous concerns about the effectiveness of the proposal. CPAWS was concerned that the closed season did not protect wolves during the mating season; the proposal failed to provide protection across the entire range of the eastern wolf; and that the hunting and trapping of wolves is still permitted in protected areas. CPAWS was supportive of the monitoring and reporting requirements, as well as the precautionary inclusion of coyotes in the closed season.

CPAWS, Ontario Nature, the Wildlands League and Earthroots commented that there should be a year-round closed season for eastern wolves within their range. All four groups stated that eastern wolves, because of their federal and provincial status as a species at risk, warrant being listed as a "specially protected mammal" under the *Fish and Wildlife Conservation Act*. It is prohibited to hunt and trap specially protected species, except in defence of property.

Earthroots was supportive of MNR's proposal, although it did share many of the same concerns that CPAWS expressed. Earthroots did raise concern with regard to the ministry's regulation of the eastern wolf as a subspecies of gray wolf – *Canis lupus lycaon* – rather than as a distinct species – *Canis lycaon*. As the ECO noted in our 2001/2002 annual report, the taxonomic classification of the eastern wolf has significant implications for its conservation measures and its at-risk status. One of Canada's leading wolf experts observed that if eastern wolves were considered to be a distinct species, they would be "one of the most endangered canid species in the world." Numerous scientific reports and studies have concluded that the eastern wolf should be recognized as a distinct species.

The Ontario Federation of Agriculture (OFA) did not support MNR's proposal, asserting that there was "no scientific justification" for a closed season and "no demonstrated need" for the mandatory reporting of wolf and coyote harvests. The OFA also did not support the requirement for licencing, the use of bag-limits, or the precautionary inclusion of coyotes. However, the OFA did note that it supports "initiatives to develop a better scientific basis for making wolf management decisions, and reminds the Ministry of Natural Resources that appropriate decisions cannot be made in an information vacuum." The Ontario Cattlemen's Association and the Ontario Sheep Marketing Association also voiced similar concerns.

The Ontario Fur Managers Federation (OFMF) did not support the ministry's proposal as it believes that Ontario's wolf populations are not sufficiently at-risk to warrant a closed season. However, the OFMF "acknowledges and supports the value of additional scientific research on wolves," including studies to determine the effects of trapping. The OFMF did not support the use of bag-limits as trappers "should continue to harvest wolves in accordance to their abundance, of which trappers are the best judges on a trapline by trapline basis." The OFMF supported the proposed mandatory reporting as trappers are already required to do so as a condition of their trapping licences.

SEV

MNR states that it reviewed its Statement of Environmental Values (SEV) in formulating its final decision. The ministry's SEV consideration referenced all of the proposed amendments under the *FWCA*, despite the fact that the initial Environmental Registry decision notice only dealt with the creation of a closed wolf/coyote season. According to the ministry, a subsequent decision notice on the game seals and mandatory reporting will be posted on the Registry and it also will be covered by this same SEV consideration.

The ministry asserts that, "the purpose of the proposal is to enhance the conservation of wolf populations within wolf range in Ontario. The issuance of seals for resident and non-resident hunters will assist with tracking the number of wolf hunters in the province. The requirement for mandatory reporting beginning in 2005 will provide the necessary data to properly assess hunter activity and total annual wolf harvest to assist with understanding trends in wolf populations."

Other Information

In our 2001/2002 annual report, the ECO recommended that MNR maintain the moratorium on the hunting and trapping of eastern wolves in the townships surrounding Algonquin Provincial Park until such time as the population is scientifically demonstrated to be viable. The ECO also encouraged MNR to provide sufficient staff and resources to support the long-term monitoring of the eastern wolf across its natural range in Ontario as such data is necessary to make scientifically informed decisions.

In our 2002/2003 annual report, partly as a result of an *EBR* application, the ECO urged MNR to create a province-wide strategy and to list the eastern wolf as a species at risk. The ECO also noted in that report that there are "significant gaps in the scientific study of wolves.... This is clearly evident in the lack of estimates of wolf population numbers and their current ranges, particularly as they apply to Ontario." However, at that time, MNR argued that these suggested measures were unnecessary as Ontario's wolf populations were healthy and that there was no evidence that hunting posed a threat to their sustainability.

Since that time, MNR reversed it position by committing to a strategy and listing the eastern wolf as a species of special concern. The ECO commended the ministry on its change of policy in our 2003/2004 annual report, as it represented an opportunity for science to play "a more substantive role in guiding ministry wildlife policies."

In March 2004, MNR announced a year-round closed season on the hunting and trapping of wolves would be put in place in the 40 townships surrounding Algonquin Provincial Park. The ban also included parts of the park where hunting and trapping were historically allowed. The area in and around Algonquin, with a population of approximately 200 animals, is currently the largest protected area in North America for eastern wolves.

In November 2004, MNR posted a proposal notice on the Environmental Registry for a provincial strategy for wolves. Its goal is to "ensure sustainable wolf populations and the ecosystems on which they rely for the continuous ecological, social, cultural and economic benefit of the people of Ontario." MNR acknowledges that there are a number of challenges in developing and implementing such a strategy for wolves, including:

- The difficulty in estimating the number and distribution of different species of wolves at various geographical scales;
- Identifying appropriate scale and quantity of information needed to support decision-making to ensure conservation of wolves;
- Managing a top predator that may be seen as a competitor with humans for some prey species;
- Understanding the cumulative effects of other conservation actions in relation to achieving wolf conservation objectives; and
- The considerable range in understanding about wolves and their role in the ecosystem as well as an apparent diversity of interests in wolf conservation.

MNR's proposed provincial strategy for wolves likely will assist the ministry in meeting its responsibilities under the federal *Species at Risk Act* to develop a management plan for the eastern wolf. Management plans must be developed by 2008 for species of special concern. As Ontario's eastern wolves live almost exclusively on lands regulated by the province, not federal lands, MNR likely will assume the lead role in the development of a management plan for this species and their habitat. This management plan would be placed on a federal species at risk registry for public comment and subsequently reviewed every five years. MNR policy also dictates that any species recovery plans that the ministry develops also shall be posted on the Environment Registry for public review and comment.

The establishment of a closed season for eastern wolves and gray wolves is part of the larger issue of protecting species at risk in Ontario. The Ontario government has committed to protecting such species by means of the "National Accord for the Protection of Species at Risk" and the "National Statement of Commitment to the Canadian Biodiversity Strategy." For MNR to implement the Canadian Biodiversity Strategy, it should protect and restore "viable populations across their natural historical range."

In February 2005, MNR released its new strategic directions framework entitled "Our Sustainable Future." According to the ministry, it details "specific strategies and proposed actions to help us plan activities and deliver results that are aligned with our strategic direction." In this document, MNR commits to "establish and implement a provincial wolf management strategy and policy, including consideration of Algonquin Park wolves and related science, management and protection needs."

In March 2005, MNR released its draft "Ontario Biodiversity Strategy." As part of this initiative, the ministry states that it will review "relevant legislation and regulations to identify gaps and issues (e.g., disincentives), and propose changes in the legal framework for the conservation of biodiversity" that may include issues surrounding "species of increasing conservation concern" such as wolves. In its assessment of threats to Ontario's biodiversity, the strategy does recognize that the "unregulated and unsustainable harvest of some species remains a concern."

ECO Comment

The ECO is encouraged by the initial steps that MNR has undertaken to conserve Ontario's wolves. Wolves are among the most easily identifiable symbols of wilderness in the province and how they are treated reflects on our broader stewardship of Ontario's natural environment. Not only must wolf populations be sustainable for their own sakes, but they must also have the capacity to fulfill their natural ecological role as a top predator.

The new closed season now effectively treats wolves in the same way that the ministry treats most of Ontario's other species of mammals. This is a dramatic shift in attitude and it brings MNR's treatment of wolves in-line with that of other jurisdictions. However, as acknowledged by the ministry itself, this only represents an "initial step" in establishing a proper wildlife management program for Ontario's wolves. The establishment of bag-limits, reporting requirements, and monitoring programs will provide valuable information to guide future actions. These future actions must be based on sound science to conserve Ontario's wolves effectively, as well as to be defensible and understandable for the public.

MNR should heed the cautionary tale of the treatment of wolves in the United States, including the lengthy and extremely costly measures to restore wolves to some of their former range in the lower 48 states. It is far easier and significantly less controversial to conserve a species still in the wild than to have to put it back in.

Review of Posted Decision: MNR's Provincial Wood Supply Strategy

Decision Information:

Registry Number: PB04E7002	Comment Period: 30 days
Proposal Posted: February 9, 2004	Number of Comments: 8
Decision Posted: June 10, 2004	Decision Implemented: June 2004

Description

The Provincial Wood Supply Strategy ("Supply Strategy") published in June 2004 replaces the Regional Wood Supply Strategies published by MNR in 2003. The two primary objectives of the Supply Strategy are:

- To sustain a continuous, predictable, long-term wood supply necessary for industrial processing facilities (mills); and
- To increase the level of long-term available wood supply.

The purpose of the Supply Strategy is to identify critical wood supply issues and provide approaches for addressing those issues. Seven issues are identified, although the most important has been discussed for many years: a shortage of fibre for the forest industry as the available mature timber supply declines and the young trees regenerated in the past 20 years reach harvest age. MNR sets out 20 individual strategies for dealing with the wood supply gap and other identified issues.

The Wood Supply Issues:

Wood Supply Gap

Across the Boreal Forest zone future wood supply is predicted to drop below current demand, creating a "wood supply gap." The forecast predicts that spruce-pine-fir (SPF) supplies will fall below demand in five to ten years and take 80 years to recover. Poplar supply will fall below demand in 15 years and take 70 years to recover. MNR describes the wood supply gap as "by far the most critical issue facing the forest industry in this part of the Province. The developing gap between wood supply and demand presents an unavoidable dilemma – increase the wood supply or reduce mill consumption."

The supply gap has been forecast by MNR for over a decade. The "gap" is primarily the result of an age-class imbalance in the forest, with a preponderance of very old and very young forest, but this imbalance is not a result of natural factors. Very successful fire suppression over the past 50 years has reduced the area burned and naturally regenerated. The level of industrial wood consumption has also increased over the past 50 years. The Supply Strategy says the philosophy has been "use it rather than lose it to natural decline."

The increased clearcut harvest and low rate of renewal before 1980, together with fire suppression, have changed the boreal forests to be generally older than they would have been naturally, with species conversion from conifers to a higher proportion of low-volume mixed-wood or hardwood forests. The result is a scarcity of healthy mid-aged forest (i.e., 20 to 60 years old) needed to sustain current industrial demand levels in the future.

Poor Information

The second wood supply issue, which applies across the entire province, is the need for better information. MNR states that there is general agreement on the existence of the projected wood supply gap, however there is still debate over the size of the gap and when it will occur, because the ability to accurately predict wood supply is limited by the quality of existing information.

Great Lakes-St. Lawrence Issues
The Supply Strategy identifies five additional issues restricted to the Great Lakes-St. Lawrence Forest, including a chronic shortage of high-quality hardwoods and surplus of low-quality hardwoods because of 'high-grading' (removing the highest-quality, large-diameter trees); concern about sustainability of the private land harvest; declining poplar supplies; and regeneration problems in older white pine stands. (See the Supply Strategy itself for a description of most of these issues.)

The Strategies:
The strategies to address the two main issues generally fall into three categories: rationalizing demand; improving the information used to determine wood supply; and increasing the overall supply of wood. MNR sets out eleven strategies to apply across the province, including the following:

Review mill demand: review and update the demand forecasts by reviewing the Ministry Recognized Operating Level (MROL) for each mill. MROLs tend towards mill capacity but are usually higher than actual usage. It is expected that new MROLs will be adjusted toward the volume of actual utilization (high priority).

Use mill demand information to set supply levels: Industry relations staff at MNR will provide mill demand information to planning teams to help set wood supply objectives and harvest levels in each forest management plan. Where the available supply is determined to be less than demand, the forest management plan will address the shortfall with strategies (high priority).

Improve supply information: including forest management modelling; growth and yield information; forest resources inventory; knowledge of stand condition and forest succession (medium to high priority).

Increase the use of available wood: including tops and areas of low volume harvest, as well as using less desirable species (medium priority).

Intensive Forest Management (IFM): use silviculture to increase forest productivity, i.e., to shorten tree rotation ages to grow more wood in less time. Some areas will be identified for IFM, and techniques may include density control, thinning, prescribed burning and other methods (high priority).

Increase protection of the forest from fire, pests and diseases: MNR will develop a new fire strategy which will include increased fire suppression in areas of valuable timber stands, areas of intensive forest management and areas of the Northern Boreal that may be available for commercial forestry soon (high priority).

"Ensure guide effectiveness and efficiency": review and consolidate forest management guides to reduce redundancies, update science and simplify the planning process. Forest management guides include a broad set of provincial guidelines, construction or operational manuals and resource or environmental manuals. Their use is mandatory in forest management. Resource or environmental manuals are used in the development of forest management strategies and prescriptions for specific values such as water bodies, fish and wildlife habitat and tourism and cultural heritage values. MNR has also committed to a socio-economic review of all new guides and guide revisions for their effect on wood supply (very high priority).

Great Lakes-St. Lawrence Strategies:
There are nine additional strategies which attempt to address the specific Great Lakes-St. Lawrence Forest issues, including: improving the growing stock after harvest; minimizing logging damage after mechanized harvest; using the surplus low-grade hardwoods; studying the private land wood supply;

advising industry of the forecasted decline in poplar supply and improving white pine regeneration. See the Supply Strategy for the detailed descriptions of these strategies.

Background:
Policy Context
Part 1 of the document describes how the Supply Strategy fits into the framework of Ontario forest legislation and policy. The Ontario Forest Accord, signed in 1999, is an agreement negotiated between MNR, the forest industry and a coalition of environmental groups. They agreed that there would be no long-term reduction in the supply of fibre necessary for industrial processing as a result of new protected areas identified at the time and to support the concept of long-term continuity and security of wood fibre supply.

MNR says that analysis has confirmed that mitigation measures subsequently introduced have offset wood supply reductions resulting from the introduction of the protected areas. The Ontario Forest Accord Advisory Board (OFAAB) developed a "Room to Grow" policy framework to benchmark harvest levels considered the long-term requirements for industry and to determine levels for sharing permanent increases between the forest industry and parks. These benchmark harvest and sharing levels have been incorporated into the Supply Strategy, but are not used as the "demand" levels in MNR's analysis.

The Data
The wood supply database called "Appendix 1" is available on MNR's website only. The management-unit-level information of supply and demand is aggregated into the regional graphs presented in Part 2 of the document. Part 2 of the document contains the detailed Regional Reports, describing wood supply and demand in the three MNR administrative regions – the Northwest, Northeast and Great Lakes – St. Lawrence Forests (GL-SL Forest).

Current demand is measured by the Ministry Recognized Operating Levels for mills (MROLs). For most species and regions, the OFAAB benchmark and sharing thresholds are much lower than demand as measured by the MROLs. This is because the OFAAB defined the benchmark industrial wood requirement as the highest annual harvest level between 1994-1999, and the MROLs tend to be much closer to the level the mill was designed to be able to use at full capacity. The supply forecasts and historical data were taken from forest management plans for each management unit. The harvest data was derived from actual harvest volumes.

MNR did not attempt to forecast future demand levels or to predict future trends in the forest products sector, such as the ability of industry to adapt to the type of wood that is available. Further, MNR pointed out that wood supply projections are based on the forecasts of existing FMPs and do not normally include the impact of recent changes such as new forest management guides. MNR cautioned that this may lead to regional wood supply shortages sooner than predicted, and individual management units may also experience supply shortages earlier and at a greater level than indicated in the Supply Strategy.

Future Directions
MNR says that the Provincial Wood Supply Strategy document and its charts will be formally reviewed and revised "periodically," but should be thought of as a "living document." The individual strategies contained in the document may be revised at any time if an important wood supply issue arises. MNR will update the supporting data annually, and make it available on its internet site, as new management plans are approved and as existing MROLs are amended. A summary of the current Provincial Wood Supply Strategy will be provided in its five-year Environmental Assessment Report. MNR also mentioned a number of other related initiatives discussed below under "Other Information."

Implications of the Decision

The implications and impact of the Supply Strategy are difficult to predict because MNR does not hold industry to implementing the strategies: "these represent MNR wood supply strategies and do not necessarily reflect those of any one community or forest company."

The wood supply gap is resulting in increased pressure to harvest north of the Area of the Undertaking (AOU) where commercial forestry is currently approved. The Fire Strategy explains that the Northern Boreal Initiative will allow the government to meet commitments for wood supply under the Ontario Forest Accord. For this reason, MNR is increasing the level of fire protection in the Northern Boreal Zone to protect the "future wood supply."

The document also confirms the ECO's concern about the sustainability of private forests, especially in the southcentral region. MNR admits that it has little understanding of the state of the forests or their sustainability, but says that most of the harvest on private land proceeds with little or no regeneration effort after cutting. Despite this concern, "there is no intent on the part of MNR to regulate private land forestry or to return to directly providing forestry services to private landowners." The ECO supports the strategy to undertake a Southern Region Private Wood Supply Study.

Public Participation & *EBR* Process

MNR received eight submissions with constructive and detailed comments from individual forest industry companies and forest industry associations as well as environmental groups and an MNR employee. The Union of Ontario Indians wrote that the *EBR* process does not work for First Nations communities, and the government has failed in their duty to consult.

While industry commenters welcomed MNR's attempt to address the impending shortages, they emphasized that the strategies must be affordable and operationally feasible (e.g., small tops are useful only to pulp mills). They also stated that many of the strategies will do little to increase wood supply. The Ontario Forest Industries Association took the position that "Industry does not believe the MROL for the Northwest should be reduced up to 10%… MROLs need to take into account the large capital investments that have been made, based on MNR approved business plans." One major company said plainly that an increase in supply is required to maintain socio-economic benefits from forest management. That company strongly supported the strategy to protect the existing forest stock from fire and the strategy to review forest management guidelines, assuming the result would be improved access to standing mature timber and an increase in wood supply.

An environmental group pointed out that using the current MROLs as the measure of wood demand overstates the timber supply problem and may create additional strain on planning teams to meet inflated fibre objectives.

Another environmental group reminded MNR that the Ontario Forest Accord had not been developed with public consultation, and there was considerable dissatisfaction expressed by a range of forest stakeholders after the contents of the Forest Accord and the means of its development were made public; subsequently, the Forest Accord continues to lack legitimacy as a basis for forest policy in Ontario. This group also questioned the specifics and public consultation mechanisms for the broader Forest Sector Strategy, any of the strategies being revised and the "use of insecticides" mentioned in the protection strategy. They also asked why the Supply Strategy fails to question the underlying assumption that shelterwood is an appropriate silvicultural system for harvesting white pine, given its limited success record.

Another commenter also questioned increased use of pesticides in intensive forestry, and the lack of consideration for non-consumptive users of the forest. "Forestry companies and greed have created the impending shortfall and no amount of rationalization can change that fact. It is time to give other industry, non-consumptive forest users, for example a chance to create a sustainable working environment, not time to scrape together more resources for those who have already abused what they have."

MNR did a good job of summarizing the comments in the *EBR* decision notice, but did not make any substantive changes to the text of the policy or to the decision-making process as a result of the comments.

SEV

MNR prepared a 7-page SEV briefing note, signed by the ADM of the Forests Division, indicating that he considered the SEV in making this decision. MNR considered that the Supply Strategy served several purposes of the *EBR* and MNR's SEV, particularly MNR's objective "to ensure the continuing availability of natural resources for the long-term benefit of the people of Ontario." MNR emphasized the economic rationales and benefits of the policy.

Other Information

The Supply Strategy is linked to several previously announced policy initiatives; a number of related current initiatives; and many more which will flow out of its implementation. Some have already been subject to Registry postings and public consultation, and others may be posted on the Registry for consultation in the future.

Forest Sector Strategy

The Supply Strategy says that a broader Forest Sector Strategy is under development. It will examine the potential impact that various large-scale and long-term influences will have on the commercial forest sector in Ontario. The objective of this project is to develop strategies and tactics to address the broader economic, commercial and social challenges and opportunities that will face the forest sector in the coming years.

Forest Sector Competitiveness Council

The Minister of Natural Resources created an advisory council in November 2004 to provide recommendations to help ensure a secure future for the forest products industry. The council is scheduled to submit a report and recommendations to the minister in the spring of 2005. It includes representatives from the municipal sector, the forest industry, First Nations and one environmental group.

Enhanced Forest Management – Science Information and Analysis Initiative

The Supply Strategy says that this initiative of the Provincial Forest Policy Committee has implications for wood supply. The project will focus on establishing long-term funding for government and the forest industry to better understand silviculture effects and effectiveness (on growth and yield, environment, etc.) in order to maximize returns on silviculture investments. Action on this project will assist with the implementation of the strategies contained within this document.

Room to Grow

MNR has accepted the OFAAB's March 2002 final report on "Room to Grow" and will complete a detailed implementation plan for the Ontario Forest Accord commitments. The Room to Grow report not only benchmarks the industrial harvest levels and a sharing level for establishing new parks, but also describes a process for setting aside 12 per cent of the area of each forest management unit for intensive forest management. MNR said in the decision notice for the Supply Strategy that it is "currently developing a formal policy for implementation of room to grow and it is outside the scope of the Strategy." MNR has not provided an opportunity for public consultation on the Room to Grow policy framework to date.

Enhanced Forest Productivity / Intensive Forest Management
In December 2002 MNR posted an information notice (XB2E7001) on the Registry inviting input to a discussion paper entitled "Towards Enhanced Forest Productivity," prepared by a joint government, industry and ENGO committee. Because it was an information notice on the Registry, there was no decision notice. Some elements of the Enhanced Forest Productivity discussion paper and the Room to Grow Final Report related to IFM have been incorporated into the Supply Strategy, but without much detail.

Forest Fire Management Strategy
MNR proposed its Fire Strategy in May 2000 (PB00E7001) and commenced implementation in May 2004 (see pages 198-208 of this Supplement). Fire suppression is cited as one of the root causes of the wood supply problem, yet one of the strategies is to increase fire suppression efforts and expand them across more of the province. Both the Supply Strategy and Fire Strategy describe the inherent conflict between the need for fire and the desire to protect commercially valuable stands of timber. As a result of fire suppression and poor silvicultural practices, the boreal forests are now older than they would have been, with a greater component of shade-tolerant species, insect damage and woody debris.

First Room to Grow Initiative
In December 2004 MNR posted proposal notices on the Registry for a new mill licence in the community of Greenstone (IB04E1010) and four new protected areas (PB04E1009) within the woodshed of the proposed facility. The mill proposes to use its aspen poplar wood supply currently used by two existing mills the company is planning to close, plus obtain the same amount again of new poplar and birch through business arrangements with licensees and private landowners. The proposal for additional wood supply is accompanied by a proposal to add to protected areas to meet the intent of the Ontario Forest Accord. The ECO will review these proposals after they are finalized.

ECO Comment
In 2004, MNR produced a Provincial Wood Supply Strategy, which is a consolidated wood supply report and plan of action for Ontario. The primary purpose is to identify critical wood supply issues and provide strategies to address those issues. The Strategy describes an impending shortage of wood for the commercial forest industry as the available mature timber supply declines and until the young trees regenerated in the past 20 years reach harvest age. In the Boreal Forest, the supply of softwoods is forecast to fall below demand in five to ten years and take 80 years to fully recover. For poplar, shortages will begin in 15 years and take 70 years to recover.

The supply gap has been forecast by MNR for over a decade. Decades of successful fire suppression, accelerated harvest and inadequate renewal efforts has resulted in a scarcity of forest stands between 20 and 60 years old to replace the mature forest as supply declines. The creation of new protected areas and the application of new forest management guides that protect areas of forest for wildlife habitat have also been cited as factors in reducing wood supply.

MNR says that the wood supply gap is by far the most critical issue facing the forest industry and presents an unavoidable dilemma – increase the wood supply or reduce mill consumption. MNR's stated wood supply objectives (within the overall bounds of forest sustainability) are to sustain a continuous, predictable, long-term wood supply necessary for industrial processing facilities; and to increase the level of long-term supply.

The ECO supports some of the strategies aimed at improving forest information, silvicultural effectiveness and a forest health monitoring program to detect stresses related to climate change, insect or diseases. But overall, the Provincial Wood Supply Strategy gives too much weight to industrial demand at the expense of the long-term health and ecological viability of Ontario's Crown forests. It also illustrates a shift in the balance between ecological and economic factors in the ministry's decision-making.

Only one strategy among 20 reflects the need to adjust to a declining supply. The rest of the proposed strategies either refine demand through improving the quality of information or attempt to increase wood supply, instead of constraining demand to bring it in line with the declining supply. And despite the assurance that the wood supply objectives will be met "within the bounds of overall forest sustainability," some of the proposed strategies do have the potential to threaten long-term forest health and even exacerbate the wood supply issues. Increased emphasis in the Wood Supply Strategy on using mill demand information to set wood supply objectives and available harvest levels in forest management plans raises doubts as to MNR's assurance that wood supply is determined by an assessment of what the forest can sustainably provide.

The Strategy and other initiatives such as the Minister's Forest Sector Competitiveness Council have been influenced by the recent closure of mills in northern Ontario communities. But wood supply shortages are only one of the factors cited by companies closing mills. Other reasons provided by companies include the falling U.S. dollar, U.S. duties on Canadian softwood lumber and high energy costs.

The supply gap has been approaching for a long time, and the root cause is the age-class imbalance caused by fire suppression, accelerated harvest and inadequate renewal efforts. MNR knew before it made the commitment in the Ontario Forest Accord in 1999 that there would be no long-term reduction in the supply of fibre necessary for industrial processing as a result of the new protected areas identified at that time, and to support the concept of long-term continuity and security of wood fibre supply.

Cutting more and more of the mature forest, to the detriment of other forest values, is still not going to produce the productive second growth forest needed to sustain the forest industry in the medium and long term. The forest industry also needs to demonstrate that it is operating within the bounds of sustainability, in order to achieve and maintain forest certification, increasingly demanded by international wood markets. Parks and buffer zones are not the reason for the impending wood shortage, and removing or weakening environmental safeguards is not the answer.

Review of Posted Decision:
Wind Power Development on Crown Land

Decision Information:

Registry Number: PB03E6004
Proposal Posted: April 14, 2003
Decision Posted: March 31, 2004

Comment Period: 45 days
Number of Comments: 2
Decision Implemented: April 2004

Description

The Ontario government has committed to increasing the amount of electricity generated within the province by wind or other renewable forms of energy (five per cent by 2007 and ten per cent by 2010). MNR created a policy and procedure that outline the process and conditions by which Crown land may be made available to proponents of wind turbine-based, electricity generating projects. Provincially, approximately 87 per cent of the land base is owned by the Crown, with the land base of northern and central Ontario being extensively Crown-owned. Thus, MNR's policy opens a vast land area for wind power exploration and potential development and will assist the government in meeting its renewable energy target.

According to MNR "commercially viable wind farm sites are generally known to be located along the north shore of Lake Superior, the James Bay lowlands and off-shore in the Great Lakes. Most of these sites are Crown lands." Some Great Lake locations, e.g., the shorelines of Lakes Erie and Huron, are considered particularly desirable since they are close to both transmission lines and electricity markets which reduces the need for new lines and the potential for line losses over great distances. To help realize these opportunities MNR created the policy Wind Power Development on Crown Land. The primary purpose of MNR's new policy is to put in place a two-stage process for the release of lands for wind resource testing and potential wind power development:

1. Site Release for Exploration (Option Period)

This is a process to govern the Option Period, i.e., when a site is being tested to determine its wind power potential and viability as an electricity generating site. MNR created three different kinds of site release for exploration purposes: Non-Competitive Right to Explore; Competitive Bid Process; and Far North Remote Community (for a description of each of these processes see MNR's policy Wind Power Development on Crown Land).

2. Final Allocation (Lease Period)

This is a process to govern the disposing of lands for a longer term lease period so that wind turbines and associated equipment can be installed on site. MNR identified the following steps that must be considered or are required by wind power proponents: completion of consultation with aboriginal communities if required; meeting the environmental assessment requirement of the Ministry Class EA for Resource Stewardship and Facility Development and/or *Environmental Assessment Act*, Regulation 116/01 (Electricity Projects Regulation); and completion of an approved Plan of Development (POD). Depending on the results of the above the ministry may allow the applicant to exercise the option to take out a Crown Lease. Once the Lease is issued, construction of the turbines and infrastructure can commence in accordance with the POD.

Crown land access for wind power exploration and development will not be free for proponents. MNR devised the following fees schedule for the use of the lands and resources in each of the periods:

Application Fee: A $1,000 fee to cover costs to MNR such as undertaking an environmental review, conducting a competitive bid process or providing geographic information services. It is payable by all applicants under all allocation processes.

Non-Competitive Right to Explore Fee: an applicant will be charged $20,000 by MNR for the exclusive right to explore a site (this is one of three ways a site could be secured for exploration; the other means are through a competitive bid process, or, for far north remote communities the right to explore was granted without fee).

Grid Cell Fee: A fee of $300 per cell (approximately 45-65 hectares in size) is charged along with the application fee. The total fee paid will vary with the number of cells being sought (the larger the area, the more grid cells there are, the more that will be paid by the applicant). In the case of a public tender process, each applicant must bid at least $300 per cell.

Administrative Base Land Rent: An annual administrative base land rent of $1,000 which replaces the base land rent (paid up to the period of production) for the grid cell grouping, will be applied in addition to the Wind Land Rental Charge when it is implemented after January 1, 2012.

Base Land Rent: A base land rent will be applied to the area under Option and under the subsequent Crown Lease. This rent is payable annually at the beginning of the calendar year and will be applied until such time as the Wind Land Rental Charge is payable (at which time the administrative base land rent will apply).

Wind Land Rental Charge: This charge is based on the total installed capacity of the wind farm in kilowatts which is identified in the POD and will be applied beginning eight years after the date of approval of this policy.

Other Fees: The federal Goods and Services Tax will be collected on all transactions.

In effect, MNR's new policy and procedure are only a portion of the screening and approvals process to site one or more wind turbines, and in many respects, are similar to a mineral exploration process, in which land is made available for site testing which could lead to the development of a mine. As such, this policy does not provide the details of how projects will be assessed for their environmental impacts. For this MNR relies on existing processes under the *Environmental Assessment Act* including the Class EA for Resource Stewardship and Facility Development and the Environmental Assessment Requirements for Electricity Projects as noted in MNR's description under "Final Allocation."

Implications of the Decision

A standardized, orderly, predictable process has been created to allow for wind power development to occur on Crown land in Ontario. MNR was diligent in drafting the policy and procedure, using a step-by-step staged approach to cover most foreseeable situations, from the provision of lands for testing purposes through to assessing a potential development and leasing the land for wind power generation purposes. MNR has even planned out an approach for resolving those cases when two or more applicants want to use the same tract of land.

It is too early to say if this policy will have a significant impact because it only was approved in late March 2004 and because Ontario has relatively limited experience with wind power. However, the experience of other jurisdictions with more history with wind power could be insightful for Ontario. In other jurisdictions where wind power has been promoted, e.g., California or Germany, the industry and its associated generating potential has grown rapidly. While wind turbines generally have significant environmental benefits, some people consider them unsightly and with the potential for negative environmental impacts. On the positive side, they are among the most benign, emission-free forms of generating electricity. Wind turbines produce very little noise, release no odours or virtually any pollutants in their operation. However, wind turbine operation includes the potential for some bird collisions or migration disruption as well as visual impacts for local residents (e.g., often wind turbines are perceived as an industrial installation in a natural or rural setting). The negative impacts can vary greatly from region to region, but can often be mitigated by appropriate siting processes. In fact, some jurisdictions are siting wind turbines in off-shore locations (partly because of good wind resources) but also in part to minimize visual interference on certain landscapes. Offshore and shoreline installations could be a significant area of interest in Ontario, as the Great Lakes coastlines provide some of the best wind resources in Ontario. Such installations will require special consideration to prevent conflict with other lake users, e.g., navigation, as well as disruption of habitat, e.g., fisheries.

One item that is not explicitly detailed in the policy document is whether wind turbines are permitted or banned in provincial parks and conservation reserves. MNR chose to place a prohibition on wind turbine placement in provincial parks, conservation reserves and certain other protected areas in an accompanying procedure document (PL 4.10.04) available through an "extranet site" (http://www.mnr.gov.on.ca /MNR/windpower /index.html). To obtain the procedure, a member of the public must provide name and contact information in order to get a password to log-on to the site. The ECO notes that resource development in parks, natural areas, and conservations areas are frequently the subject of conflict with recreation and nature enthusiasts. Such an important consideration (the prohibition of commercial wind power developments in parks) deserves to appear in the policy document.

Public Participation & *EBR* Process

Two organizations commented on this proposal – the Canadian Wind Energy Association, or CanWEA, and the Niagara Escarpment Commission (NEC). Despite the small number of commenters, numerous issues were raised. The issues raised by CanWEA were primarily administrative and financial in nature while NEC raised issues about the compatibility of wind turbines with the escarpment landscape. The following are the main comment areas, as identified by MNR, as well as any response from the ministry or change to the document:

Rental charges under Base Land Rent and Wind Land Rental Charge were considered to be too high by industry. MNR made changes to address these concerns.

The length of the five-year Holiday Period was considered too short. MNR reviewed the comments and has extended the Wind Land Rental Holiday to a period of eight years from the approval of this policy or otherwise noted as January 1, 2012.

One of the commenters recommended wording and textual reorganization to improve the overall readability of the policy. Detail was placed in a companion document, a "Procedure" which outlines the review process of an application. MNR said that this information will be posted on an extranet site available for review by wind applicants.

MNR amended the review date for both the policy and the procedure to accommodate concerns around administrative processes within both documents. Given that the Wind Power policy is new, an annual review of the policy and procedure is appropriate to ensure that the documents reflect the best interests of the province and other changes which may occur in the broader government energy portfolio, according to MNR.

A Wind Allocation Tracking System has been developed in conjunction with MNR's Geomatics Section which will assist in the tracking of applications and allocation of Crown land with wind power potential throughout the province. The maximum number of contiguous grid cells per application has been increased from 40 to 44 to accommodate concerns around the overall amount of land needed for testing purposes. This area may not be the total final area required for the actual wind farm.

MNR staff from certain program areas, e.g., fisheries, parks and protected areas, raised issues specific to their program interests. MNR indicated that detailed procedures may be required by those programs for review of specific applications. (No further details were provided by MNR in the decision notice. However, in 2004, MNR informed the ECO that district offices are being supplied with guidelines and criteria to assess wind power proposals, that the ministry is working with the federal Department of Fisheries and Oceans on fishery issues, and that procedure PL.4.10.04 deals with the parks and protected areas issue.)

The site release process for a small scale self supply applicant was modified. A small scale self supply system is one that would meet the energy requirements of an individual dwelling, farm or cluster thereof. A threshold of 1 MW or less is defined as small scale self supply. Such systems are not connected to the electricity grid and are not able to sell their electricity over the grid.

The Niagara Escarpment Commission commented that: "wind turbine towers are not compatible with the environmental and scenic resources of the Escarpment due to their dominating and highly visible nature. Moreover, the facilities associated with wind towers such as service roads, transmission lines, and connections add to their overall negative impact." In March 2004 (when MNR finalized its decision), this issue was not resolved and MNR merely stated that: "NEC staff are currently reviewing comments received from the public and other organizations with a recommendation to follow." MNR reported that the position of the Commission is "that wind power development be precluded on Crown and MNR lands in the area of the Niagara Escarpment Plan." (The ECO notes that there is not a great deal of Crown land in the Niagara Escarpment Plan area, nor in southern Ontario generally, relative to northern Ontario.) For more on the NEC position, see "Other Information."

ECO Concerns with Process and Public Participation

Potential Conflict of Duties for MNR? In the lead-up to this policy decision, the wind power industry played a major role in characterizing the provincial support needed to advance its interests. In 2001, prior to MNR's policy proposal, a committee force called the Ontario Wind Power Task Force met and compiled a report with recommendations for the promotion of wind power (including goals like 10,000 MW of wind power by 2010). MNR provided staff support to the Task Force's work. The report was part of MNR's *EBR* posting (thus a member of the public could perceive it to be the direction of the government). While MNR's proposal was posted, CanWEA commented on the proposal that MNR put forward, and MNR made adjustments to its policy based on CanWEA's comment. Members of the public could question the independence of MNR in setting the policy in the first place and also question whether MNR is able to act as a legitimate rule enforcer and applicant elevator when it comes to reviewing applications for the use of Crown land for wind power purposes because it is also actively promoting this industry.

To its credit, MNR undertook a wider ranging policy review and pre-consultation, e.g., by telephone to other jurisdictions, other government agencies, ENGOs and industry in advance of the *EBR* consultation. This probably helped to provide some balance to the policy proposal that was posted for comment.

Testing Period Notification. Site and resource testing activities will be governed by MNR's Class Environmental Assessment for Resource Stewardship and Facilities Development Projects (Class EA). The ECO notes that there are no environmental assessment requirements including public consultation for projects designated Category A under this Class EA. For Category B projects, permits do not appear as proposals on the province-wide Environmental Registry, instead, notice may be served only to neighbouring landowners. In the instance of wind turbines that might be situated in remote Crown land regions of the province, there may be few neighbouring landowners to contact. MNR could have required that testing activities will be at least a Category B in their Class EA so that from the start of testing activities (which could lead to development), some stakeholders will know about the potential for a project in an area.

Competing Goals? Since the province wants to promote wind power, the wind industry may have heightened expectations that when sites with good wind resources are found, they will be deemed prime candidates for development. But, subsequent to testing and before any site development, environmental review requirements under the regulatory process known as Environmental Assessment Requirements for Electricity Projects must be met. If prime wind resources are found in an area in which wildlife could be highly sensitive to a wind power installation, then MNR and MOE may find it difficult to restrain development since the province has declared that it wishes to promote wind power.

Handling and Explanation of Policy Documents. In MNR's words, its Wind Power Development on Crown Land Policy is meant to be read in conjunction with its accompanying procedure. But MNR provided Registry users with access to only the policy in its decision notice; access to the procedure document was described in the notice as being provided through an extranet to applicants. ECO questions the need for this approach as much of the content of the procedure could be found in the original, much longer, proposed policy. In other words, much of the procedure was already public anyway. In the interests of transparency it would be preferable to have all key documents accessible as links to the Registry decision notice.

MNR also should have done a better job of coordinating and explaining what was in the proposal package for the purposes of public comment, as well as how the package was presented in the decision. MNR indicated that there was only one policy, Wind Power Development on Crown Land (termed "PL" in the proposal, and "PL 4.10.04" when finalized) for comment through this proposal process, which was accurate. The proposal notice also mentioned that the proposed policy should be read in conjunction with "PL 4.02.01" Application Review and Land Disposition Process. As mentioned, the final form of the proposed policy was actually two documents: a policy posted with the decision and a procedure not posted with the decision. The final posted policy also referred small-scale system applicants to "PL 6.01.02" Crown Land Rental Policy. This multi-document approach can be confusing for the public. MNR could have specified clearly in the proposal notice that only one document, the proposed policy Wind Power Development on Crown Land, was the subject of public comment – the other linked documents were for reference only and were not under revision.

Finally, something as simple as a map of Crown land in Ontario would have helped the public understand where the proposed policy would apply on a geographic basis.

Less Stakeholder Concern than Expected? MNR's proposal notice indicates that the ministry scheduled a consultation specifically for the environment, tourism and recreation sectors but it was cancelled due to lack of participation. Such an attempt was worthwhile to undertake on MNR's part. The lack of participation may have reflected the fact that specific project sites were not identified at that time, as opposed to there not being interest in the matter from potentially affected parties. Identifying specific project sites is often the trigger for interest by stakeholders as stakeholders are then aware that their interests could be affected by a proposed project. Until this happens, the province-wide policy to govern the activity might have been considered too abstract for stakeholders to be concerned about it.

SEV

MNR's SEV briefing note was quite comprehensive and identified many areas of the policy which aligned with MNR's Statement of Environmental Values. MNR could find nothing in the proposed policy that conflicted with any provisions or commitments in its SEV.

Other Information

The NEC finalized its position on October 20, 2004. The Commission's position, after consultations with the public, largely reflects that of its 2003 policy paper (the paper which was the basis of the comments to MNR through the Registry proposal). The final policy report by the NEC concludes "The current relatively continuous natural state of the Escarpment is a symbol of what has been achieved through the very careful consideration of development in all its forms along the Escarpment by the Commission…The mandate to provide the province with additional 'green' power shouldn't be traded against the mandate for the preservation of the Escarpment." NEC recommended that "large scale industrial-type wind power developments should not be permitted in those portions of the NEP that are prominent for their scenic resources and natural values." The NEC final policy report did offer that smaller household or farm wind generators may be considered on a case-by-case basis, and that wind farm proposals would only be considered in less sensitive escarpment areas and would require an amendment to the NEP.

In 2004, ECO contacted MNR to enquire why the prohibition on wind power developments in parks and protected areas was not included in the policy. MNR indicated that the prohibition was not spelled out in the policy because MNR had no provincial wind atlas at the time that could be integrated with the ministry's existing land use information to determine the overlap of wind resources and protected natural areas. As of late 2004, MNR does not have the wind atlas information integrated with their existing land use database.

ECO Comment

The ECO recognizes that it can be difficult to strike the right balance when trying to promote a resource development activity like wind power while attempting to extract fair return for services or land provided for the activity. MNR created its policy on the basis that the province should receive a reasonable financial return for land and services offered to the wind industry. But if fees that MNR established prove to be too high, then fewer turbines might get built and the province's goal of renewable energy may not be met. Industry implied that the fees were too high relative to the risks and financial return. For these and other reasons it is prudent that MNR built in an annual review (the first review date being April 19, 2005) of the policy. If necessary, the fee structure could be revisited in the future.

Based on the observations of wind power developments in other jurisdictions, the ECO believes that the environmental benefits of wind turbines generally outweigh their negative impacts. Extra caution must be exercised to avoid conflict with certain natural features such as wildlife migration corridors. If interruption of wildlife was encountered, the possibility exists of removing an installation and restoring native conditions (though there will be financial or contract implications). Other factors which should mitigate the impact of wind power development include the relatively light 'footprint' from turbine installation and that only certain areas of the province are ideally suited for wind turbine placement.

MNR should have more clearly and prominently provided an indication of areas of the province where wind turbine proposals would be considered appropriate and where inappropriate so that industrial stakeholders would have felt greater certainty and the public more reassured about sensitive natural areas. As mentioned, MNR could have included a clear statement about the application of the policy within parks, conservation reserves and protected areas in the policy as opposed to in the procedure. Stakeholders look to MNR for this type of information as MNR is the only ministry with detailed natural resources information such as the location of Crown land and the boundaries of parks and conservation reserves.

Review of Posted Decision: Amendments to the Forest Management Planning Manual

Decision Information:

Registry Number: RB03E7004	Comment Period: 60 days
Proposal Posted: November 21, 2003	Number of Comments: 43
Decision Posted: September 1, 2004	Decision Implemented: September 1, 2004

Description:

The Forest Management Planning Manual (FMPM) is one of four manuals required by the *Crown Forest Sustainability Act, 1994* (*CFSA*) to guide forest management on Crown lands in Ontario. The FMPM was first regulated in 1996 and underwent a major review that was finalized in June 2004. The key changes stem from a decision to have forest management plans prepared and renewed on a 10-year cycle instead of five.

The FMPM is a roughly 500-page technical document containing detailed instructions for planning and implementing forest management activities. It applies to a vast area: the 385,000 square kilometres of Crown land in central and northern Ontario approved for commercial forestry, currently divided into 48 forest management units (FMUs). Each Sustainable Forest Licence-holder (on some units MNR or another designated party) must prepare a Forest Management Plan (FMP) according to the direction in the FMPM, and the plan and annual work schedules must be approved by MNR before operations can begin.

The FMPM provides direction based on the legislative requirements of the *CFSA* and the terms and conditions of approvals issued to MNR under the *Environmental Assessment Act* (*EAA*) in 1994 and 2003. The *CFSA* states that the FMPM must set out the provisions for: the contents and preparation of forest management plans and annual work schedules, including public involvement and decision-making processes. The Act also requires the FMPM to set out how sustainability of a Crown forest will be determined. The FMPM will prescribe how each FMP must contain a description of the current and future condition of the forest, as well as management objectives and indicators relating to forest diversity, social and economic objectives, and silviculture objectives for harvest, renewal and maintenance of the forest.

In 1994, MNR received approval from the Environmental Assessment Board for its Class Environmental Assessment for Timber Management on Crown Lands in Ontario (Timber Class EA). The very detailed terms and conditions (Ts & Cs) prescribing the forest management planning process formed the basis of the original 1996 FMPM. A required review of the Timber Class EA at the end of its approval resulted in a major consolidation and revision of the Ts & Cs, with a new Forest Management Declaration Order issued by MOE in June 2003 (see the ECO review in the 2003/2004 ECO annual report and Supplement). The forest management planning Ts & Cs were required to be incorporated into the revised FMPM within a year of the approval of the Declaration Order.

The revisions to the FMPM were the last phase of the regulatory measures needed to streamline the planning process. The drive to do that began just as the FMPM was finalized in 1996. Concurrent with deep cuts to MNR's forest management budget, the 1996 Forest Management Business Plan shifted many planning and operational responsibilities to the forest industry and recognized that there would be a steep increase in industry's costs of forest management planning. A MNR-industry Forest Management Transition Team recommended streamlining the forest management planning process and extending the forest management planning cycle from five to 10 years. Both of these 1996 documents and the 1999 Ontario Forest Accord (OFA) recognized that amendments were required to both the Timber Class EA terms and conditions and the *CFSA* regulations and manuals to streamline the planning process and make other proposed changes to effect the shift of responsibilities from MNR to industry. It took many years to carry out consultations and do the actual technical and policy writing and regulatory work to effect the proposed changes. The actual changes will be phased in over several more years as existing management plans expire and new management plans are prepared in each management unit across the province.

Significant Changes Introduced by the 2004 FMPM

Some changes were proposed by MNR and approved in the Declaration Order, and incorporated exactly as approved into the FMPM. Other changes were sketched out in the Declaration Order and are spelled out in much more detail in the FMPM. Many more detailed provisions of the FMPM are unique to the manual, since it is over 400 pages longer than the Declaration Order, and gains some of its regulatory authority from the *CFSA*.

The most significant change to the planning process is that instead of preparing a new plan every five years, plans will be prepared for a 10-year period and will normally be renewed every 10 years. The strategic, long-term planning and the planning of the first five years of operations occur during Phase I, which begins roughly two and a half years before operations begin, and includes five stages of public consultation. The details of operations for the second five-year term occur during the planning for Phase II, which occurs during the fifth year of operations, and includes three stages of public consultation. This planning structure was approved by MOE in the 2003 Declaration Order.

The Issue Resolution Procedure is much more detailed and formal than in the past, with requests for issue resolution going to the Plan Author, then MNR District Manager or Regional Director depending on when the request is made. The length of time during which requests can be made has been shortened slightly, however. The opportunity for requesting an individual environmental assessment from the Minister of the Environment has been drastically reduced. MNR's thinking behind this change was to avoid delays in plan review and approval by improving the MNR-adjudicated issue resolution process, and limiting the MOE-regulated EA process to a 30-day period after the plans are approved by MNR.

Road planning and management has changed substantially. Some other major changes have been implemented from the Access Roads and Water Crossings Initiative, and those proposals had not previously been subject to public scrutiny. All existing roads will be inventoried at the beginning of planning. The responsibility for roads will be clearly assigned. Roads which are the responsibility of industry will be planned and managed within the forest management planning system. The others will be planned and managed by MNR in a separate process. All existing and new road or road networks that are the responsibility of industry will have a use management strategy.

Resource Stewardship Agreements (RSAs) are business agreements between the forest industry and resource-based tourist operators. The Tourism and Forestry Industry Memorandum of Understanding was developed after 1996 so RSAs have just been incorporated into the FMPM. They are developed during meetings that occur before the first "Invitation to Participate" and so are not subject to public scrutiny. However, aspects of this agreement that directly impact decisions made in the forest management plan are incorporated into proposals in the plan for public review and comment. Subsequent to the public review of these proposals they may go forward unchanged, may be altered or may not be approved for implementation

MNR transferred its responsibility to inspect and monitor forestry operations for compliance with forest management guides and forest operations prescriptions to SFL holders in 1998. MNR has been requiring industry to prepare compliance plans and to fill in the FMP tables and annual inspection reports, but the regulatory authority had been unclear. The 2004 FMPM now integrates compliance planning, monitoring and reporting into the FMP planning process.

Another major change resulting from the move to a 10-year cycle is that the assessment of objective achievement and sustainability does not occur until years seven and ten, instead of year five. This change may make it harder to notice problems or make needed corrections, especially once the second five-year operational plan has been approved. Similarly, the requirement to update inventory information is moved from five to ten years. The 10-year plan cycle may also delay the application of new forest management guides.

The revised FMPM contains an expanded list of criteria, objectives and indicators to assess objective achievement and forest sustainability. They are used in developing management objectives in the forest management plans and then to assess objective achievement and declare the FMP achieves forest sustainability at years seven and ten. This a positive measure, because the objectives and indicators are mandatory, and each planning team will develop their own desirable levels and associated targets for the indicators.

The development of the management strategy has changed subtly in the 2004 FMPM. Assessments of wood supply are no longer linked to consideration of the associated and varying need for silvicultural funding, and the proposed management strategy must undergo a new separate social and economic assessment. The shift in emphasis towards meeting industrial demand and increasing wood supply can be traced to the Ontario Forest Accord commitments of 1999, and the new Provincial Wood Supply Policy, reviewed in this Supplement on pages 178-184 and in the 2004/2005 annual report on pages 80-82.

Reference to most specific operational and environmental guides has been removed, as the FMPM anticipates that guides will be revised more often than the FMPM. The ECO had raised concerns with MNR after the draft FMPM removed the language specifically requiring planning teams to develop objectives according to the direction in the old growth conservation strategy that had been included as an appendix in the 1996 FMPM. MNR did not fully return to the earlier tougher language, but the 2004 FMPM does refer to the 2003 Old Growth Policy as guidance and MNR added "amount and distribution of old growth forest" as a mandatory indicator of the objective "forest structure, composition and abundance."

Implications of the Decision

The most important implications of the 2004 FMPM stem from the move to a 10-year planning horizon. First, opportunities for public consultation have been substantially reduced. Over a 10-year cycle, the number of public notices is somewhat reduced, Information Centres have been reduced by 25 per cent, and the number of months during which a stakeholder can seek issue resolution or bump-up has also been reduced. Once the long-term direction is set and public consultation and issue resolution opportunities are closed, there will be little recourse for many years. However, the issue resolution procedure has been enhanced by making it more formal, with clearly defined timelines, roles and responsibilities and documentation.

MNR will still place information notices on the Environmental Registry at the same time as the public notice is issued in each stage of the public consultation process for the preparation of a forest management plan, major amendment or insect pest management program. There will just be fewer notices, corresponding to the changes.

The incorporation of industry compliance plans into FMPs is a positive change. This was recommended by MNR's forest compliance review, and a related *EBR* application for review reported in our 2003/2004 annual report. Having the compliance plans incorporated into the FMPs will make them much more transparent and more enforceable.

The requirement to inventory all existing roads and access controls, to create road management strategies, and the addition of road density as a criteria for sustainability, could have benefits for the protection of water crossings and roadless areas.

The ECO is concerned about the choice of "per cent of inspections in compliance" as indicators of achievement of various ecological objectives, for example "protecting and conserving Ontario's forest soil and water resources." It is not necessarily a good measure of the impact of operations on soil or water resources – the rules could be inadequate, the determination or reporting of compliance could be made incorrectly, and it is not a direct indicator of forest health. Firstly, MNR has acknowledged that there is a need to strengthen the existing forestry standards and enforcement provisions for both soil and water resources. Secondly, as we reported in 2002/2003, the self-compliance reporting system is weak in identifying minor infractions.

MNR's 2001 "State of the Forest Report" discussed the problems with using forest inspections reports as a measure of soil and water health. They used compliance statistics to support a soil indicator and two water indicators. They stated that they are indirect indicators, but they use them because effective water and soil resource monitoring methods are too intensive and costly for operational-level monitoring. Intensive long-term research designed to validate these indirect measures is underway. The Report also said that research efforts are underway to find appropriate methods for monitoring soil damage and to describe and quantify the effects of forest management activities on water quality and fish habitat.

The major overhaul of the FMP process should be more efficient and cost effective for industry. MNR said that one of the reasons for revising the forest management planning process was to find efficiencies because it was taking 24 to 27 months and cost up to $900,000 to prepare an FMP every five years. The time and cost savings will come in the reduced requirements for the second five years. The reduction in planning effort is expected to be about 15 months over the 10-year period.

Another of the strategies proposed by MNR and industry in 1996 was to convert small Crown Management Units into SFLs and consolidate units in order to take advantage of economies of scale and reduce administrative and operational costs for both MNR and the forest industry. This was seen as an absolute prerequisite for delivering the cost reductions proposed in the Forest Management Business Plan. MNR acknowledged that this may lead to eradicating a large proportion of the small operator community, and that there was "a real possibility that amalgamated units will become too large, too variable and too administratively unwieldy for meaningful forest management to occur." The number of Forest Management Units has been reduced as per the Transition Team's recommendations from 81 in 1996 to 48 as of April 1, 2004. One change made in the FMPM to accommodate the change in management unit size is to provide for two separate local citizens committees if necessary on a large management unit.

Because the revisions to the FMPM could only be effected by regulation, MNR prepared a Regulatory Impact Statement. Unfortunately, the ministry did not provide any analysis of the anticipated impacts: "The anticipated environmental, economic and social impacts of the proposed amendment are anticipated to be neutral."

Public Participation & *EBR* Process

MOE's Declaration Order was finalized in June 2003 and from this date MNR had 12 months to finalize its revisions to the FMPM. As set out in the *CFSA*, MNR also had to develop a regulation setting out a public consultation process for revising the FMPM before the revisions could be approved. The process regulation was finalized in December 2003 and reviewed in the Supplement to the ECO 2003/2004 annual report.

In July 2003, MNR provided a "working draft" of the revised FMPM to selected MNR staff, the forest industry and the Ontario Professional Foresters Association for a three-month review. In September 2003, MNR staff met with interested ministries and federal agencies previously engaged in the preparation of MOE's Declaration Order and provided them with the manual and copy of the "working draft."

MNR sent letters to its "FMP Mailing List" in October 2003 providing notice that the draft FMPM revisions would be posted on the Registry soon. A second letter was sent out in November 2003 providing notice of the FMPM revision process underway and inviting them to attend seven information sessions held across the province in November and December 2003. MNR made a very good effort to notify interested persons about the proposed FMPM amendments in late 2003. MNR provided more written notices than required by its regulation or the minimum *EBR* requirements, plus additional review periods, meetings and public information centres.

The joint submission from SFLs, the Ontario Forest Industry, Ontario Lumber Manufacturers Association, Independent Loggers and Kimberley Clark indicated that overall, industry was happy with the changes to the planning process and that most of the recommendations from the Forest Management Improvement Project had been incorporated into the draft FMPM.

The comments from other stakeholders illustrate a lot of unresolved concerns about the major changes that had been approved through the EA process in 2003, as the ECO reported last year. MNR quantified the comments and said that of the 776 individual concerns raised in the 43 letters, 274 were beyond the scope of the manual or were related to issues already approved in the Declaration Order. This is true, but reflects the high level of frustration expressed by stakeholders during both public consultation processes. Of the 502 concerns that it said could be addressed, MNR did an excellent job of categorizing and considering those concerns, and describing the effect of public comments in the decision notice.

The subject that received the most comments was the reclassification of roads. It also attracted the widest range of viewpoints. There was much disagreement over the reclassification of roads, their corridor width, and the responsibility for the cost of their construction, maintenance and decommissioning. MNR made no substantive changes to its new rules for roads in response, but clarified the wording.

Many commenters raised concern about the way MNR intended to assess sustainability, particularly the choice of indicators and the inference that if the FMU achieved its management objectives then sustainability was also achieved. Comments on this point came from ENGOs, professional foresters, resource-based tourism operators, consultants and other ministries. Some also asked that additional indicators be added to the assessment list. For example, several commenters asked for marten and caribou habitat to be included as indicators and the federal Department of Fisheries and Oceans asked for a requirement that critical fish habitat be measured.

MNR responded by revising the table to remove the proposed column entitled "Management Objectives and Targets" and added a number of new indicators such as old growth and road density, and revised others such as forest structure and composition, landscape pattern and landscape level habitat. The selection of which forest dependent species at risk and what habitat are to be monitored will be a planning team decision, made in consultation with MNR regional planning staff, including MNR biologists.

MNR explained in its Registry decision notice that the section was rewritten to clarify the role of objectives and indicators in the determination of sustainability, but no changes in the relationship were made because the FMPM was consistent with the regulatory direction in the *CFSA*.

Several ENGOs and aboriginal groups objected to the phrase in the draft FMPM, "if the achievement of non-timber objectives is limited by the achievement of wood supply…," because they felt this compromised the protection of non-timber forest values. This section was reworded in the final FMPM to remove the explicit suggestion that wood supply takes precedence.

Aboriginal organizations and First Nations expressed serious concerns with the public consultation and many specific proposed revisions. MNR characterized their concerns as "out of the scope of the FMPM." But the removal of the EA T&C requiring negotiations regarding opportunities for Aboriginal communities from the FMPM appendix was within the scope of the FMPM revision project. MNR did revise the wording in the Aboriginal consultation section to clarify that the ministry will consider accepting an Aboriginal community's existing consultation approach, and that the MNR will make early and ongoing efforts to engage each Aboriginal community in the development of an agreed upon consultation approach. Concerns were raised by Aboriginal organizations, First Nations and the Ontario Native Affairs Secretariat about whether the government has met its obligations under Section 35 of the Constitution to consult. MNR's response was that all requirements related to Aboriginal involvement are consistent with the Declaration Order.

The changes to the opportunities for public consultation drew comments from almost every sector, all of which objected to the substantial reduction. Even industry suggested that the timelines for comment were unclear. MNR made no changes in response to these comments.

SEV

MNR considered its Statement of Environmental Values in making this decision. The SEV briefing note clearly explained how the decision furthers the ministry's goals and policy principles. The SEV also identifies 11 desired outcomes of the ministry's management of natural resources, and the FMPM specifically addresses many of them, in particular: "land and natural resources are planned and managed in an orderly way." The briefing note also notes that the FMPM requires all forest management plans to contain a brief description of how the SEV has been considered in the development of the plan and will contain a SEV briefing note in its supplementary documentation.

Other Information

Forest Information Manual

MNR also revised the Forest Information Manual (FIM) by approving an Addendum to the FIM in June 2004 at the same time as it regulated the changes to the FMPM. MNR staff informed the ECO that the FIM Addendum is intended to provide continuity between the FMPM and FIM until a further review and amendment of the FIM is completed. A more comprehensive review of the FIM is underway.

ECO Comment

This major overhaul of the FMP process should be more efficient and cost effective for industry, but with some loss of public consultation rights and opportunities. The seed for these changes was sown at the same time as the original FMPM was being finalized. The 1996 FMPM said "At the time of writing, forest management policy in Ontario was undergoing rapid change. The new business relationship with the forest industry, rapid technological developments, and changing government priorities will all necessitate future revisions to the FMPM."

Many commenters were frustrated that the main changes to the planning process had already been approved in the Timber Class EA Review, and that their concerns had not been addressed in that consultation exercise. But MNR carried out a good public consultation exercise on the FMPM changes, within their deadline to regulate the revised manual.

The 10-year planning horizon reduces the opportunities for public consultation, including public notice, open houses and appeal of decisions. Opportunities for public consultation would be improved if MNR made the "Year-3 Annual Report," which contains the recommendation on whether or not the long-term management direction remains valid or requires change, subject to public scrutiny.

In the past the public saw issue resolution and bump-up requests as parallel processes by which they could influence the management direction of an FMU and perhaps engage MOE in resolving conflicts. MOE has never granted a bump-up request on forestry issues in the past, but does occasionally attach conditions to its denial of bump-up requests. The improvements to the issue resolution procedure may reduce the number of bump-up requests, but to be effective, it must be transparent and genuine.

MNR made some improvements in areas raised in the past by the ECO: old growth; roadless areas and access controls; and compliance. MNR added old growth as an indicator as a result of public comment. MNR also added new requirements for planning access controls on roads and mapping all existing roads, both called for in an *EBR* application regarding roadless areas and access issues. Finally, MNR incorporated compliance planning into FMP planning and monitoring.

The ECO is concerned about the choice of "per cent of inspections in compliance" as indicators of achievement of various ecological objectives, for example "protecting and conserving Ontario's forest soil and water resources." The ECO urges MNR to finalize new soil and water protection standards, continue research programs to assess the impacts of forestry on soil productivity, water and fish habitat and to develop better indicators and methods of assessment.

The ECO is somewhat concerned that the move to a 10-year plan could delay the incorporation of needed corrections into forestry operations. MNR uses an "adaptive management" approach to forest management. MNR has said previously that "On the ground, adaptive management achieves minimal risk because decisions taken around managing Ontario's forests are revisited strategically at scheduled times. Given active programs of research and monitoring, these time steps are sufficiently short that any misdirection can be rectified before significant area has been altered." Long-term decisions made in FMPs and confirmed in year-three annual reports without public consultation are then going to be implemented without any chance of correction until the next 10-year plan is developed. And these decisions will alter very large areas of the province. This does not seem consistent with MNR's adaptive management approach.

Finally, the new planning system will require continued vigilant monitoring and participation of public and stakeholders. The role of the Local Citizen Committees is more important than ever, since they will have the only "public" input into the decision whether to prepare a second five-year plan. MNR should ensure that stakeholders continue to have the capacity and opportunities to participate in forest management planning. The ECO will continue to monitor issue resolution and the development of objectives and indicators in the first set of 10-year plans produced for approval in 2007.

Review of Posted Decision:
Forest Fire Management Strategy for Ontario

Decision Information:
Registry Number: PB00E7001
Proposal Posted: May 12, 2000, March 12, 2002
Decision Posted: July 26, 2004
Comment Period: 60 days, 30 days
Number of Comments: 7
Decision Implemented: May 7, 2004.

Description
The Ministry of Natural Resources (MNR) has lead responsibility for forest fire management in the province. This responsibility is shared with private landowners, resource users and municipalities. MNR states that the Forest Fire Management Strategy ("the fire strategy") provides direction to natural resource managers on priorities to protect human and natural resource values, including forests, and support ecologically sound resource management. Fires have burned approximately a quarter of a million hectares (ha) of forest each year in Ontario in recent decades, but the area burnt varies dramatically from year to year. In contrast, almost three times this amount of forest burned prior to the introduction of forest fire suppression in the 1920s.

In ecological terms, fires are a landscape level phenomenon. The fires that have significant impact on forest structure and wood supply are much larger than a forest stand or group of forest stands. A few large fires that are spread over a handful of days in the fire season consume most of the area burned in a region. For example, approximately three per cent of all fires account for almost all of the area burned and most of the fire management expenditures. The distribution of fire sizes also makes it difficult to predict fire impacts on forests in a small land area, such as a forest management unit or a provincial park, over a relatively short period of time.

In the late 1980s, MNR developed forest fire management strategies, one for each of the ministry's then seven administrative fire regions. However, the ministry recognized that these strategies did not reflect the many changes in land use, values, and demands that have occurred since they were approved. As well, there was a need to set a new direction in fire management that is consistent with the purposes of the *Crown Forest Sustainability Act*, the direction contained in "Ontario's Living Legacy Land Use Strategy," and the "Ontario Forest Accord."

In 1997, the ministry had discussed the possibility of transferring some of the costs and responsibilities of fire management to the forest industry. Several options were debated, including the privatization of all or parts of the fire management program. However, this idea was backed away from by 1999, when the ministry committed itself in the Ontario Forest Accord to "continue to be responsible for forest protection measures and [MNR] will assign a higher priority to forest protection measures necessary to protect intensively managed forest." As a result, MNR proposed the Forest Fire Management Strategy for Ontario in 2000, approving it four years later in 2004.

MNR's intent for the fire strategy is to establish measurable, attainable objectives for fire management that take into account the need for public safety, existing and planned infrastructure values, plans for wood supply, protected areas, resource-based tourism, and wildlife habitat. It provides the strategic direction for the management of wildfire on 107 million ha of Crown and private lands.

Ten Year Summary of Fires in Ontario: Number, Area Burned, and Naturally-caused (1995-2004)

Year	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004
Number of Fires	2,122	1,245	1,636	2,279	1,017	644	1,562	1,132	1,015	426
Area Burned (ha)	612,436	445,146	38,525	158,278	328,263	6,733	10,732	172, 585	314,219	1,676
Naturally-caused	53%	52%	41%	62%	37%	30%	65%	60%	50%	n.a.

Strategic Directions:

To set the level of protection, the fire strategy goes beyond statements of strategic direction and includes broad direction for the fire management program. The Aviation and Forest Fire Management Branch in the ministry's Forests Division has the primary responsibility for this program and strategy. This branch has an estimated budget of $96 million for the fiscal year of 2004/2005. To achieve provincial, regional and local fire management objectives, the Forest Fire Management Program will be guided by a number of strategic directions:

- Ensure public safety
- Protect wood supply
- Promote fire's role in the ecosystem
- Enhance partnerships and agreements
- Promote public education and prevention
- Manage the business of fire management
- Manage fire response

Quantified descriptions of the resources required to achieve these objectives are detailed along with descriptions of the impacts and expected outcomes. These objectives, resource descriptions, and impact measures direct the fire management program toward achieving specific, operational measures of success, according to the ministry. The fire management program will report annually on its success in meeting these targets by zone and by ecoregion. The strategy has an objective to restrict fire depletion of valuable forest resources to less than 75,100 ha per year, on average, and to provide ecological renewal through fire of up to 160,100 ha per year. However, these targets likely will never be met in any one year due to the dramatic variability of the number and intensity of fires from year to year.

Ensure Public Safety

The rationale for forest fire management in Ontario is broadly based in that it will "prevent injury, value loss and social disruption resulting from a forest fire." However, a significant component of the strategy is to protect human life, communities, and the infrastructure that supports the economic and social fabric of Ontario. Its intent is to protect urban areas, homes, cottages, lodges, and infrastructure such as roads, railways, hydro/communications lines, and recreation developments.

Protecting Wood Supply and Forest Productivity

MNR states that recent initiatives, including the Ontario Forest Accord, have placed increased emphasis on the protection of wood supplies across the province (see pages 178-184 of this annual report Supplement). Provincial parks and other protected areas have been set aside, defining the industrial forest land base that will support mills and economic growth based on wood fibre. The Ontario Forest Accord also outlines a commitment to increase the intensity of forest management in areas of the province and calls for increasing the fire response priority on these areas to protect this forest investment from fire.

The ministry sees a link between the long-term security of wood supply and protecting areas from fire in which there has been, or will be, increased silvicultural investment. The Ontario Forest Accord provides for the long-term continuity and security of wood fibre supply and recognizes that there will be increasing investment in silviculture to increase wood supply on the available landscape. However, MNR does acknowledge that protecting wood supply through fire suppression may jeopardize long-term forest productivity and ecological health.

Promote Fire's Role in the Ecosystem
Fire renews forests, creates natural habitats, and provides for biological diversity at a landscape level. According to this strategy, fire is viewed as both a positive and negative force. MNR states that fires that pose a threat to public safety or have detrimental effects on current and future wood supply are negative. The fire management program will suppress these fires with the goal of minimizing the area burned.

The ministry asserts that fires that burn and do not threaten public safety or human values can be viewed as positive. Examples of these areas include fires on islands, within protected areas and areas identified by resource managers for hazard reduction. These fires, for the most part, do not impact wood supply, and are a positive outcome for fire management according to the ministry. When risks of negative impacts are acceptable, the fire management program will apply a modified or monitored response to these positive fires, with the goal of optimizing area burned.

Enhance Partnerships and Agreements
MNR states that the fire management program will assist all municipalities and federal areas to meet their responsibilities for forest fire protection within their boundaries. The fire management program will also maintain agreements with municipalities to strengthen cooperative delivery on both Crown and private land, including working with First Nations and resource-based tourism operations.

The southern boundary of the East Fire Region describes the southern extent of the influence of the *Forest Fires Prevention Act*. However, the ministry does state that it will act in an advisory capacity for municipalities in the areas of training, fire prevention, and prescribed burning.

The Ontario Municipal Property Assessment Corporation indicates businesses and individuals hold some 1.877 million ha of private land outside of municipalities within the East and West fire regions. This figure is based on all private land parcels over 200 ha. There is currently no strategy or funding for the protection of these lands. However, MNR says that it will discuss opportunities for fire prevention, suppression and cost recovery agreements for forest fire protection on these lands.

MNR states that it will maintain its long-standing partnership with the forest industry. This dialogue will be expanded to identify key forestry objectives in Forest Management Plans such as hazard reduction opportunities, response priorities in areas where there has been a significant silvicultural investment, and prescribed fire opportunities. Discussions will also take place with the forest industry to address key strategic issues such as fire prevention and the impacts of forest fires on critical wood supply.

Promote Public Education and Prevention
The ministry asserts that it will provide the public with balanced information about fire, the role of fire management, regulations, and the public's responsibility with fire such that compliance programs reduce unwanted human-caused wildfires and fires are enabled to play a role in natural resource management. MNR also states that it will develop strategies to reduce the occurrence of the most serious wildfires and to mitigate the level of damage that occurs.

Manage the Business of Fire Management

MNR organizes fire management spending into three areas: Infrastructure Management, Response Preparedness, and Fire Suppression. The first two components are annual investments designed to prepare the program for expected fire load and to minimize spending on the third component. The ministry asserts that if the fire management program infrastructure and seasonal preparedness components are reduced single-mindedly, not only will protection levels be compromised, but suppression spending will escalate once fires arrive, and resources are hired on an emergency basis, at a higher cost to the government.

Manage Forest Fire Response

According to MNR, fire will exhibit both positive and negative impacts on the landscape depending upon the variable measured. The desired net effect of impacts on all the variables will determine the preferred management objective for the landscape and therefore will govern the selection of the most appropriate fire management response. MNR has designed the fire strategy around the concept of "managed" fire while utilizing three main options for wildfire response: full response, modified response and monitored response. Based on the fire strategy, fire managers may choose the appropriate response option and adapt the response option to the changing fire situation.

Full response requires suppression action to be taken on the entire fire perimeter to acquire control. Full response is utilized where the objective is to minimize the area burned and where fires have the potential to cause major social disruption and/or significant negative impacts to values and resources.

Modified response requires suppression action to be taken on key areas of the fire perimeter to achieve the desired objective. Modified response is utilized within the Area of Undertaking for commercial forestry under situations of problematic control, or when management guidelines such as an approved resource management plan (i.e., park management plan, wildlife management plan, forest management plan, conservation reserve management plan, etc.) provides the criteria for the beneficial use of fire to achieve the desired management objective. North of the Area of the Undertaking, modified response is an option where managing the fire will achieve control objectives, the minimization of negative social impacts, and where beneficial ecological, economic or resource management objectives could be achieved.

Monitored response is an option where forest fires are observed and assessed to determine the response option if response is required to minimize social disruption and/or economic impact.

Fire Management Zones:

The fire strategy divides the province into six fire management zones based on common management objectives, land use, fire load, and forest ecology: Southern Ontario; Parks; Great Lakes/St. Lawrence; Boreal; Northern Boreal; and Hudson Bay. MNR says that these zones will allow the strategy to balance the protection of human values with the positive effects of fire as a management tool to meet silvicultural and ecological objectives. The ministry states that this means the fire management program will move aggressively in suppressing fire in some circumstances, but will manage or use fire in other situations to achieve ecological objectives or reduce cost or hazard.

Southern Ontario Zone

The Southern Ontario Zone is located outside the fire region and is generally south of the area of the undertaking for forest management. Municipalities have a mandate to under the *Forest Fires Prevention Act* to provide forest fire protection on all lands outside the fire region.

Parks Zone
MNR states that fire is now underrepresented in many of Ontario's provincial parks and other protected areas. Approximately 60 per cent of the 9.6 million ha set aside in parks in Ontario are in the Parks Zone. Provincial parks not included in the Parks Zone will be treated as directed in their respective park management plans. In the absence of a management plan, the fire strategy for the surrounding fire management zone will apply – typically full suppression. MNR does advocate "Light on the Land" fire suppression techniques in protected areas, as well as promoting prescribed burning as a management tool.

Fire management plans will be developed for each park in the Parks Zone subject to available park resources, according to the ministry. However, fires in many large provincial parks such as Algonquin, Killarney, Lady Evelyn, Lake Superior, Wabakimi, and Woodland Caribou will generally receive a full response and sustained action until extinguished. According to the strategy, only Opasquia and Polar Bear Provincial Parks will receive a monitored response in which full-out suppression is not undertaken. MNR's target is to allow no more than 15,000 ha to burn each year in this zone.

Great Lakes / St. Lawrence Zone
This zone is heavily populated with extensive private land and recreational development throughout. Incorporated municipalities cover much of the zone but the Crown is the largest landowner and a number of forest companies operate Sustainable Forest Licenses. The fire strategy directs that all fires having the potential to negatively impact values or cause social disruption will receive a full response and sustained action until extinguished. According to MNR, approximately 460 fires per year burn an average of 2,370 ha per year in the Great Lakes/St. Lawrence Zone. MNR's target is to allow no more than 3,200 ha to burn each year in this zone.

Boreal Zone
This zone covers 34.6 per cent of the province and the forested portion of this zone is licensed under the *Crown Forest Sustainability Act*. The strategy states that the economy of this zone is closely linked to the harvest and processing of natural resources and, therefore, the protection of wood supply is a priority. The ministry directs that all fires having the potential to negatively impact values or cause social disruption will receive full response, with the exception of fires on some designated islands or in large wetlands.

According to MNR, this zone has experienced between 200 and 2,300 fires per year in the last 25 years, accounting for 51 per cent of all fire occurrences in the province and representing an average of 61,300 ha per year. The ministry's performance-based target in the strategy for this zone is to allow no more than 55,000 ha to burn based on forest depletion and less than 10,000 ha for the purposes of ecosystem renewal and hazard reduction. However, MNR itself acknowledges that fire cycle analysis is open to subjective interpretation, depending on the length and historical timing of data that is used. In basing targets on only the last 25 years, the possibility exists for exponential differences in concluding how frequently fires are present in a given area.

Northern Boreal Zone
This zone reflects the need to protect the potential future wood supply within the area of the Northern Boreal Initiative (NBI), but none of this area is, as of yet, licensed under the *Crown Forest Sustainability Act*. Based on the NBI, MNR expects that commercial forest harvesting will expand in this zone over the next decade. The fire strategy states that all fires will be prioritized commensurate with the values at risk and the availability of suppression resources, but that all fires within a community will receive a full response.

MNR asserts that fires that do not pose a threat to the community, and are not expected to negatively impact values or cause social disruption, will receive a monitored response. Approximately 90 fires occur each year, which result in an average of 47,000 ha burned annually. However, MNR's target is to allow no more than 18,000 ha to burn for the purpose of forest depletion and 5,000 to 20,000 ha to burn for the purpose of ecosystem renewal.

There is an area north of Red Lake, the Bak Lake Subzone, which has a higher level of protection than the remainder of the over-all zone. This area has been identified under the NBI and is proceeding toward the development of a community-driven commercial forestry opportunity. As an interim measure, the fire management program will continue to provide an increased level of protection in this area. All fires across the remainder of the Northern Boreal Zone will receive a response, but if fires escape initial attack and the fire program has to deal with many other problem fires across the province, fires in this portion of the zone may be left unattended.

Hudson Bay Zone
The ministry asserts that this zone is intended to promote the ecological role of fire by allowing fire to fulfill its natural role unless it threatens First Nation communities. The fire strategy states that all fires will be prioritized commensurate with the values at risk and the availability of suppression resources, but that all fires within a community will receive a full response. An average of 128,910 ha burn each year in the Hudson Bay Zone, but MNR's target is to only let 50,000 to 125,000 ha burn. The majority of this zone is above the tree-line, but a significant number of intensive fires occur in the forests bordering Manitoba.

Implications of the Decision

Forest Infestations
The ECO is concerned that there are serious inconsistencies in the ministry's strategy that possess landscape-level ecological implications. These inconsistencies are based on the prioritization of short-term wood supply over the ecological role of fire in some areas. For example, since the late 1980s, Ontario has experienced repeated infestations of Spruce Budworm resulting in large tracts of forested area suffering mortality. Fire suppression is recognized as being one of the root causes of such infestations due to changes in forest composition and age structure. According to MNR, there are large areas of insect damaged spruce, fir, and poplar forest that are "highly flammable and now unproductive from a wood supply perspective." The forest industry has salvaged and renewed significant portions of this area, but there are still large tracts of dead or dying budworm-killed forest that pose a fire hazard. The continued suppression of fire in such areas will do little to restore the ecological health of these forests.

Northeastern Ontario also has experienced a significant decline and mortality of popular caused by repeated infestations of the Forest Tent Caterpillar that was mapped by the ministry in 2001. MNR does recognize that "without fire protection, these forests would burn, renew themselves to healthy young forests, and return to productive forests more quickly." However, the fire strategy states that "forest harvesting is active throughout these areas and available wood supply must be protected from fire." Clearly, the strategy is designed to protect short-term wood supply at the expense of the natural role of fire on the landscape for ecological or hazard reduction purposes. Further, the historical suppression of fire is a root cause of many such infestations and the continued suppression of fire will likely cause a perpetual cycle of future infestations.

Climate Change
According to MNR, emerging climatic trends compounded by the condition of forest fuels are contributing to the occurrence of larger fires that are becoming more difficult and costly to suppress. Significant wind events have contributed to the creation of between 150,000 and 200,000 ha of blow-down in the 1990s. These forest areas would have been regenerated by fire in a natural fire regime but now contribute to a growing fire hazard as forest fuels accumulate.

Studies forecast that climate change will produce longer and more frequent periods of extreme weather, such as drought, that will fuel increased fire activity. In background material to the strategy, MNR does acknowledge that Ontario is beginning to see the effects of a chronic and progressive human-caused shift in climate. For some areas of the province, this shift will mean more frequent periods of severe fire weather and, possibly, extended fire seasons.

In our 2001/2002 annual report, in reviewing MNR's "Forest Management Guide for Natural Disturbance Pattern Emulation," the ECO observed that the current combined area of burned and harvested land is greater than the area that was historically burned naturally. Clearly, the challenge for MNR to ensure that the total amount of forest burned and harvested stays within a natural variation will only become more difficult as the effects of future climate change are realized. Further, the ECO notes that MNR's targets in the fire strategy for the area burned will likely never be met in any one year due to the fluctuating number and scale of forest fires between years.

Forest Species Composition and Age Class Imbalance

Also in our 2001/2002 annual report, the ECO noted that forest harvesting and the subsequent absence of fire has altered the species composition of the forests according to MNR. In the boreal forest, stands of softwood species such as spruce and jack pine, which thrive after fire, are being replaced with hardwoods such as trembling aspen and balsam poplar, which are intolerant of both shade and fire. This shift has been well documented, and many credible audits and studies have suggested that clearcutting with inadequate regeneration efforts is the main cause of this species conversion in Ontario's boreal forest.

Prescribed Burns

The ECO also is concerned with the minimal role that is outlined in the strategy for the usage of prescribed burns. Prescribed burns are carefully planned human-caused fires that are set to meet specific resource management, silvicultural, or hazard reduction objectives. Hazard reduction is the treatment of dead or dying forest fuels to diminish the chance of a fire starting, and to lessen the potential rate of spread and resistance to control. Catastrophic fires may occur when fires have been suppressed, allowing forest fuels to accumulate that otherwise may have been consumed naturally by smaller fires. However, the strategy does not contain any quantitative targets for prescribed burns, despite the use of targets for many other components of the strategy. The lack of emphasis on the role of prescribed burns appears to be both a trend at the field-level, as well as in related ministry policies.

In 1990/1991, MNR stated that 6,166 ha of Crown land had undergone prescribed burns. A decade later, the ministry reported an almost ten-fold decrease to only 711 ha of Crown land. This trend also has been accompanied by a decrease in the numbers of prescribed burns in the Area of Undertaking for commercial forestry and many years have not even had a single prescribed burn occur. In other years, the handful of proposed prescribed burns in the area of undertaking may not have occurred due to inclement weather or the need to use these ministry resources for other aspects of the fire program. The ministry now appears to be almost exclusively conducting small-scale prescribed burns in southern Ontario for species at risk recovery planning.

The ECO notes that the minimal role given to prescribed burns in the strategy is, in part, due to the lack of requirements for prescribed burns in other ministry policies. The "Forest Management Guide for Natural Disturbance Pattern Emulation," approved in 2001, states that "the importance of using prescribed burns as frequently as possible as a silvicultural treatment to better simulate what fire would do cannot be overemphasized." However, the guide does not make prescribed burning a mandatory "standard" and its usage in forest management planning is only discretionary. The "Declaration Order Regarding MNR's Class Environmental Assessment for Forest Management" and its predecessor, the "Class Environmental Assessment for Timber Management on Crown Lands" of 1994, do not require the use of prescribed burns.

Fire Suppression and Forest-dwelling Species

Fire is a landscape-level process that many of Ontario's forest-dwelling species of fauna have evolved to depend upon. Shifts in species composition and age class imbalances of forests as a result of fire suppression will affect the behaviour, populations, and over-all survival of many species. Fire is a chemical process that cannot be replaced through the mechanical process of clear-cutting and fire suppression. For example, the forest-dwelling boreal population of woodland caribou depends upon fire as an ecological process to renew their habitat.

In our Supplement to the 2001/2002 annual report, in reviewing the "Forest Management Guidelines for the Conservation of Woodland Caribou," the ECO noted that "MNR's Forest Fire Management Strategy for Ontario will have a significant impact on species such as Woodland caribou. .. The historical ecological processes of… protected areas should occur relatively unimpaired. The boreal forest is a fire-driven landscape, and fire suppression activities in protected areas should occur in the context of caribou conservation."

Public Participation & *EBR* Process

MNR posted two proposal notices for the strategy for a total comment period of 90 days, receiving seven comments from members of the public. The ministry initially had posted a decision notice that erroneously listed 238 comments as having been submitted. However, the ECO discovered that MNR had counted the comments of ministry staff working on the development of the fire strategy, including counting each individual point raised by staff members as individual comments. The ECO informed MNR that input by its own ministry staff should not be construed as a comment for the purposes of the *Environmental Bill of Rights* and, as a result, the ministry re-posted its decision notice.

Several of the seven comments that the ministry did receive expressed concern with regard to the proposed level of protection for a subzone north of Highway 11 in northeastern Ontario. Originally, the proposed strategy outlined a lower level of protection for this particular region compared to other areas of Ontario. Several forestry companies and the Ontario Forest Industries Association (OFIA) requested an increase in the level of protection for this area. As a result, MNR chose to eliminate this subzone, incorporate this region into the Boreal Zone, and provide direction for the full suppression of fires in this area.

The OFIA also was concerned with the treatment of fire in parks and protected areas, particularly with regard to the risk of fire escaping the boundaries of protected areas when full suppression was not undertaken. However, several commenters, including the OFIA, did support the strategy's recognition of prescribed burns.

The Ministry of Northern Development and Mines (MNDM) submitted a detailed set of comments on the strategy. MNDM stated that it, along with mining landowners, need to be part of the partnership that contributes to fire management planning. MNDM also raised concern with regard to the apparent lack of aboriginal consultation in fire management planning and that it "appears to be more than just an oversight." The ministry also noted that there were no performance measures addressing public education and fire prevention training.

MNDM also commented on a discrepancy in the mapping of the fire zones. The ministry stated that the Hudson Bay Zone encompasses two distinct ecological regions with entirely different fire threats: the northern boreal forest in the southwest and the lowland muskeg, above the tree line, in the northeast. MNDM stated that these regions should be classified as different zones in the strategy.

SEV

MNR states that it reviewed its Statement of Environmental Values (SEV) in formulating its final decision. According to the ministry, the strategy will complement its overall goals and objectives by ensuring the protection of human life, natural resources and physical property from the threat of forest fires to the fullest extent possible. MNR asserts that the strategy also assists the ministry to meet its mission of ecological sustainability by establishing a framework for the use and management of fire, under approved conditions, to meet ecological or other goals. The ministry states that the strategy will:

- Contribute to the long-term health of ecosystems by protecting soil and aquatic resources, forests and wildlife resources from the adverse affects of large numbers of unwanted wildfires;
- Ensure the continued availability of natural resources for the long-term benefit of the people of Ontario by limiting the number and size of wildfires that consume valuable forest resources;
- Protect natural heritage and biological features that would be destroyed by forest fires; and,
- Ensure that fire is managed in a safe, efficient and effective manner to help sustain ecosystems within protected and natural heritage areas wherever possible.

The ECO is concerned that many of these objectives of the fire strategy appear to be inconsistent with the ministry's SEV through its characterization of fire as a "negative" or "unwanted" ecological process.

Other Information

Fire Management Policy for Provincial Parks and Conservation Reserves

Concurrent with the development of the province-wide fire strategy, MNR also consulted on and approved a "Fire Management Policy for Provincial Parks and Conservation Reserves." The purpose of this particular policy is to advance the management of fire in protected areas to restore and maintain the ecological integrity of these areas and contribute to ecological sustainability in the larger landscape, while preventing personal injury, value loss, and social disruption associated with forest fires. MNR states that protected areas that contain these fire-dependent ecosystems will not continue to represent the natural heritage that they were designed to protect unless they are exposed to fire in the coming decades.

MNR itself has raised concerns with its management of fire in protected areas. The ministry acknowledges that management plans for provincial parks and conservation reserves generally contain little fire management content, and few protected areas have resource stewardship plans. This deficiency is further compounded based on the fact that only 38 out of 548 protected areas in Ontario have approved plans that involved public consultation and that are not in need of review as reported in the ECO's 2003/2004 annual report. MNR also states that some protected area plans are never even seen by the fire managers responsible for these areas.

MNR notes that many of its own protected area planners and managers are simply not aware that the ministry's fire program has the responsibility to implement portions of these plans, and the expertise to help develop effective fire management direction. Lack of policy direction, absence of guidelines to support planning, lack of communication between MNR branches, and confusion over roles and responsibilities all play a part in hampering broader success according to the ministry. In approving the Fire Management Policy for Provincial Parks and Conservation Reserves, it is the intent of MNR to provide clear policy direction and guidelines for fire planning for these areas in the future. The ECO does commend MNR for recognizing, at least in principle, that the natural role of fire is needed in many protected areas for the maintenance and restoration of ecological integrity.

Provincial Wood Supply Strategy

Also concurrent with the development of the fire strategy, MNR approved its "Provincial Wood Supply Strategy" (see pages 178-184). The two primary objectives for this strategy are: to sustain a continuous, predictable, long-term wood supply necessary for industrial processing facilities; and to increase the level of long-term available wood supply. To achieve these objectives, MNR states that it intends "to minimize the amount of forest lost to fire and other destructive agents." As the Provincial Wood Supply Strategy notes, any effort that reduces area burned will likely result in more commercially available forest and greater industrial wood supply.

ECO Comment

The ECO has significant concerns with MNR's Forest Fire Management Strategy. Governments do face a challenging task in designing such fire strategies, being required to incorporate a broad spectrum of objectives – everything from protecting public safety and infrastructure from fire to that of realizing its ecological role in fire-driven landscapes. However, it is difficult to balance these priorities while also attempting to deal with the root causes of catastrophic forest fires. Natural Resources Canada recently warned:

> Canada has had remarkable success in putting out forest fires. Successful suppression, however, can be a two-edged sword. Fires are part of nature's way of shaping, maintaining and renewing forests. Thwarting this natural process can change the structure of tree stands, reduce forest health, lead to loss of productivity and, ironically, increase potential fire severity by allowing fuels to increase.

It is not an inadequate understanding of the physical science of fire that constrains the development and application of an effective forest fire strategy. Rather, the constraints come instead from the social and political perspectives that surround and influence forest fire management. According to the director of forest fire management for the U.S Forest Service, "at precisely the time when wildfire potential has never been greater, social expectations for protection have never been higher and political tolerance for failure has never been lower."

There are two distinct directions that forest fire strategies may take. The first approach heavily focuses on fire suppression to prioritize certain objectives, such as protecting human communities and commercial wood supply. This approach measures its success based on such targets as initial attack success rate and areas burned. This approach is narrow in its view of management as it generally concentrates resources on when fires have actually already ignited or will soon ignite. As such, it has a relatively short-term time horizon for fire management planning. What this approach gains in short-term benefits, such as a steady commercial wood supply, it sacrifices at the expense of long-term effects such as increased fuel load and risk of future catastrophic fires. MNR's strategy is modeled on this short-term perspective.

Alternatively, a second approach is to focus on managing the *risk* of forest fires, rather than primarily focusing resources on fires once they have actually already ignited. This approach takes a landscape-level view of management with a long-term time horizon. It places significant emphasis on fuels management, attempting to address the underlying causal factors that contribute to catastrophic forest fires. This approach also requires resource planners, in both government and forest industry, to actively plan upfront for fire – decades before they may even occur. In doing so, fuel loads are managed and future fires that do occur will be in a more controlled fashion and in a manner that recognizes their ecological role. Protecting communities and infrastructure remains a priority of paramount importance, but the risk of fires endangering public safety is actively planned for through the use of prescribed burning and ecologically-sensible thinning operations to reduce fuel loads. This proactive approach also costs far less.

In contrast to MNR, the U.S Forest Service has recently rejected the suppression-oriented approach and its strategy has focused on fire risk at a landscape-level. Despite the fact that the U.S Forest Service had reached a 99 per cent initial attack success rate – higher than MNR's own targets in the fire strategy – it had been incurring record-setting costs, losses, and damages in fire regimes where severe, catastrophic fire should have been rare. The U.S. Forest Service realized that devastating fires were continuing to occur as they had been attempting to manage the landscape to protect everything from commercial wood supply to watershed values, but not in ways that were consistent with the ecological dynamics of fire-driven landscapes. Catastrophic fires that are the result of suppression and excessive fuel loads do not mimic naturally-occurring forest fire regimes.

MNR's fire strategy has failed to place sufficient emphasis on managing the landscape for the risk of fire. Short-term wood supply is being protected at the expense of long-term forest health. However, the ECO notes that this is not the responsibility of the fire strategy alone – a suite of other policies such as MNR's Provincial Wood Supply Strategy, the Forest Management Guide for Natural Disturbance Pattern Emulation, and the Ontario Forest Accord are also responsible for setting this direction. As the ECO reported in its 2001/2002 annual report, natural disturbance pattern emulation – clearcutting – does not replace the ecological role of fire.

The ECO is concerned that the fire strategy contains little discussion of the methods that could be used to reduce fuel loads. For example, while the fire strategy does contain targets for suppression activities, it does not contain any targets for prescribed burning. In contrast to MNR's fire strategy, the Province of British Colombia is shifting towards a risk-based approach to fire and land management. Led by a former Premier, a comprehensive review of their fire program concluded that, "It is clear that a successful record of fire suppression has led to a fuel buildup in the forests of British Columbia. The fuel buildup means that there will be more significant and severe wildfires." Some of the key recommendations for reducing fuel build-up included:

- Fuel-treatment pilot projects in locations of high [urban] interface fire risk;
- On-site removal or burning of spacing slash to mitigate the surface fuel hazard;
- Assessment of fire-prone ecosystems within or adjacent to a wildland urban interface for risk reduction; and
- Training more professionals who can implement a forest fuel reduction program while meeting complex ecological, social, and economic constraints.

The approach of both the U.S. Forest Service and the review of B.C.'s fire program strongly emphasize the role of public education and awareness. While MNR does make these areas one of its objectives, the fire strategy does not contain any measurable targets in this regard. This is a significant weakness as fire management can be a very controversial undertaking. In contrast, the U.S. Forest Service does have targets related to education, including the number of communities that have adopted forest fire safety practices. The review of B.C.'s fire program also recommended that it should:

- Establish a provincial strategy for fireproofing [urban] interface communities;
- Mandate long-term community fireproofing programs which will build upon local zoning and building codes; and
- Begin pilot projects that will enhance safety and that can also produce economic benefits.

The ECO notes that the goal of a progressive fire strategy should not be to eradicate fire, but rather to allow naturally-occurring fires that are within acceptable limits and that do not threaten public safety. The goal of such strategies should focus on the long-term ecological health of forests. These strategies are about allowing, as well as re-introducing, *the right kind of fire*, in terms of burning intensity, duration, and time of year.

Review of Posted Decision: Prohibition on Buying and Selling Live Invasive Carps, Snakeheads and Gobies

Decision Information:

Registry Number: RB04E6005	Comment Period: 30 days
Proposal Posted: February 27, 2004	Number of Comments: 125
Decision Posted: May 6, 2004	Came into Force: April 22, 2004

Description

Invasive alien species can cause devastating ecological and economic impacts in areas where they become established. In April 2004, the Ministry of Natural Resources (MNR) issued O. Reg. 113/04 to amend O. Reg. 664/98 (Fish Licensing) under the *Fish and Wildlife Conservation Act* with the goal of protecting Ontario's "aquatic ecosystem from the introduction of high risk invasive species."

O. Reg. 113/04 prohibits the buying or selling of three groups of alien invasive freshwater fish in a live state without a licence. It does not ban the buying and selling of the dead fish in frozen or fresh states. The fish are: Asian carp (silver, grass, black and bighead), snakehead (all 28 species) and gobies (round and tubenose). Gobies, particularly round gobies, are established in parts of the Great Lakes and have moved into some inland waterways. Although they are established in some regions in the U.S., it is believed that carp and snakehead populations are not established anywhere in Ontario ecosystems. However, according to MNR, these "high-risk" fish may become introduced and established or further distributed throughout Ontario. (For information on the characteristics and potential ecological impacts of the fish please see the table below.) O. Reg. 113/04 does not apply to common carp which have been established in Ontario for over a century.

Prior to the promulgation of the amended regulation, O. Reg. 664/98, live Asian carp constituted a significant proportion of the live fresh water species sold in food fish markets in Ontario, and were purchased for use in ponds to control plant growth. Snakeheads were available live in pet stores and could be purchased on the Internet for use in aquaria. While not sold live in food fish markets in Ontario, snakeheads are available live in some parts of Canada. Gobies, which make good bait, cannot be legally used as bait. However, according to MNR, gobies have been found in bait pails.

According to MNR, the potential for accidental or deliberate release of the fish is real. In what are believed to be isolated occurrences, grass or bighead carp have been found in Lake Erie, Lake Huron and at the mouth of the Don River in Toronto. Fish sold in the aquarium trade have been found in Ontario's ecosystems and snakehead owners are known to have returned to pet stores fish which have outgrown their tanks. While MNR acknowledges that it has no hard evidence that gobies have been sold in bait pails, it has heard reports to that effect and MNR conservation officers have found gobies in anglers' bait pails. There is evidence that a significant number of anglers simply dump their bait pails into waters after fishing, although it is illegal to release the bait into waters other than the waterbody where the bait was originally captured. The prohibition in O. Reg. 113/04 extends to the buying and selling of fish for all uses, including as food, fish bait and for use in aquaria and ponds.

The introduction and establishment of the targeted fish is associated with a risk of detrimental impacts to Ontario's aquatic ecosystems and economy, particularly affecting the sport and recreational fishing industries. As MNR notes: "The degree of risk depends on the physiological capability of the species to survive and reproduce, as well as the potential for impacts on native fish communities and food webs." As the table below reveals, the targeted fish are thought to have characteristics which could allow them to become established and adversely impact Ontario ecosystems. Once established, the fish could prove nearly impossible to eradicate and costly to control.

The decision does not ban the live possession and transport of the fish. However, in the decision notice, MNR declared its intention to "seek a ban on possession of live individuals of these same fish through an amendment to Section 9.1 of the Ontario Fishery Regulations (OFRs) of the federal [*Fisheries Act*]." In early May 2004, the Minister of Natural Resources formally requested that the federal Department of Fisheries and Oceans make the amendments and that it do so in an expeditious manner.

TABLE 1: Alien Invasive Fish addressed by O. Reg. 113/04

	Carp (bighead, silver, grass, black)	**Snakehead**	**Goby (round and tubenose)**
Native to	-Asia. Introduced to North America by the aquaculture trade in southern U.S.	-Southeast Asia	-Eurasia. It is believed that gobies were originally introduced to the Great Lakes basin through ballast water on ships.
Key physical features	-Large fish which can grow to 1 m in length and weigh 50 kg. Carp have low-set eyes and scaleless heads.	-Long – can grow up to 80 cm – cylindrical fish with large mouths and canine-like teeth	-Small – grow to 25 cm – and soft-bodied fish with a large head and large fused pelvic fins
Ability to become established	-Tolerate a wide variety of environmental conditions and habitats, although the Great Lakes may be too cool for some species, such as the grass carp, to become established -Very high reproductive rate -No known predators	-Tolerate a wide range of conditions, breathe air and migrate overland. Some species can live under ice and may be able to tolerate the Canadian winter. -High reproductive rate -No known predators	-Tolerate a wide range of conditions, including polluted waters -High reproductive rate (up to 6 times per year)
Impacts	-Eat large amounts and a wide-range of foods from low trophic levels, tending to uproot large areas of vegetation in the process. Carp thereby increase water turbidity, reduce water quality, disrupt food webs, threaten endangered species and compete with sport and commercial fish.	-Compete with and, as adults, consume native fish, frogs, birds and small mammals, including those which are endangered -Transfer parasites and diseases, such as epizootic ulcerative syndrome	-Eat zooplankton, benthos and fish eggs, displacing native fish populations and disrupting food chains -As consumers of zebra mussels, gobies may transfer high contaminant loads to predators (i.e., walleye). -Linked to the outbreak of Type E botulism, spreading disease up the food chain.

Implications of the Decision

MNR's regulatory impact statement commented on the environmental, social and economic consequences of the proposed regulation.

MNR determined that the environmental consequences of the regulation are positive, noting that "the risk of introduction of invasive carps and snakeheads through the live food or aquarium pathways will be substantially reduced, while the transfer of gobies through their use as bait will be curtailed."

The ministry determined that while there will be some negative social and economic consequences of the ban, the consequences are, on balance, positive. MNR recognized that the Asian community is a significant consumer of live Asian carp, noting that there will be some "minor negative economic impacts" associated with the ban on live carp in particular. However, MNR suggested that any negative impacts would be mitigated as retailers will continue to be able to make available other species of live, but less ecologically threatening, fish and for the reason that frozen and fresh (dead) carp can still be sold. MNR also stated that snakeheads play only a small role in the aquarium trade and that "alternatives to gobies as a baitfish are widely available to anglers."

On the other hand, MNR asserted that the establishment of carp, snakehead and gobies could have negative and significant social and economic impacts. Establishment could have adverse consequences for the commercial and recreational fisheries in Ontario and expensive programs may be needed to control the impacts.

The ECO concurs with MNR's analysis of the impacts of the regulation vis-à-vis carp and snakehead. It is less clear, however, that "the transfer of gobies through their use as bait will be curtailed" given that it is not certain that the fish were ever actually sold in bait buckets and that bait harvesting and subsequent use by anglers may be a mode of distribution of the fish.

Public Participation & *EBR* Process

During the 30-day comment period, MNR received 125 responses, including 12 letters from organizations, 67 signed copies of a form letter generated by the Ontario Federation of Anglers and Hunters and two petitions prepared by companies involved in the live food fish market with 349 and 805 names affixed. Most commenters were completely in support of the ban on the sale of the three kinds of fish in a live state. Among the supporters were those who identified themselves as members of the Asian community. Two such respondents indicated that adequate alternatives to live carp exist. Some commenters backing the regulation expressed the need for MNR to work with affected stakeholders to ensure that economic and cultural issues are addressed. One commenter expressed the need for public education about Ontario's fishing regulations.

Approximately 20 sets of comments – including one petition with 349 names – expressed opposition to the ban on the sale of some (i.e., grass and bighead) or all of the targeted species of live Asian carp. About 10 sets of comments – including the second petition with 805 signatures – argued that carp should be made available live to retailers, slaughtered only at the point of sale. No opposition to the ban on the sale of live gobies or snakeheads was expressed.

Some of those opposed to the ban on carp stated that the proposed regulation should be phased in slowly. The need for compensation for those negatively affected by the regulation was expressed. One commenter denied that the Asian community is responsible for the release of fish for cultural purposes. One commenter stated that a hearing is needed on the issue while another declared that more studies are needed.

The ministry responded to most of the comments in its decision notice, but did not make any changes as a result of its consideration of them. The ministry indicated that all of the targeted fish must be slaughtered before the point of final sale as the release of fish to the environment can occur before the fish reach the consumer. Likewise, the ministry stated that it would not delay the implementation of the regulation given the potential damage the fish could cause if they became established and the costs associated with their control. While MNR did not specifically defend its statement that fish may be released live following sale for cultural practices, the ministry did state that "incidents of grass and bighead carp being captured in the Great Lakes clearly demonstrates that these fish are being released accidentally or intentionally to Ontario waters." The ministry also clarified that compensation would not be provided to "live food fish wholesalers or any other industry or sector affected by the regulation."

SEV

In a briefing note to the ECO, MNR stated that the regulation supports its objectives of ensuring the long-term health of ecosystems and ensuring the continuing availability of natural resources for the long-term benefit of the people of Ontario. The ECO agrees with MNR's assessment.

Other Information

Available literature on O. Reg. 113/04 makes it clear that the regulation applies to buying and selling conducted by Ontario's fish retailers. It does not, however, clarify whether the regulation applies to importers and wholesalers. Comments made by the Minister of Natural Resources in the legislature in May 2004 suggest that the regulation only applies to retailers. In a conversation with the ECO in November 2004, MNR clarified that the regulation applies to all transactions (including those involving importers and wholesalers) which occur within Ontario's boundaries. The ban does not, however, apply to purchases made outside of the province. Therefore, it is still legal for Ontario's importers to transport the live fish into the province, killing them only at the first point of sale in the province. According to MNR, there is only one company which imports live fish into the province and sells them (killed only at point of sale) on location.

All Great Lakes states have adopted legislation banning or severely restricting the transport and possession of some or all species of Asian carp. In the U.S., snakeheads are listed under the *Lacey Act* as an injurious species, thereby banning importation and interstate commerce of the fish. In May 2005, the federal government published and began a 30-day consultation on proposed changes to the Ontario Fishery Regulations under the *Fisheries Act* to ban the transport and possession of the fish live. Ontario's MNR is not the only body to request that the federal government take action to address these fish. In May 2003, the federal Standing Committee on Fisheries and Oceans also recommended a ban on the importation into Canada in a live state of four species of Asian carp and "any other aquatic alien species deemed harmful to Canadian wildlife or ecosystems."

In addition to the risk of establishment of Asian carp in Ontario's aquatic ecosystems through the aquarium or live food fish trade, the fish are at risk of gaining entry to Ontario's waters in another way. Three of the species of carp are presently established in the Mississippi River system and have been found within tens of kilometres of the entrance to the Great Lakes through the Chicago Sanitary and Shipping Canal. A temporary electric barrier across the canal – as well as technology creating bursts of air bubbles and piercing sound waves – is currently in place to deter the passage of the fish. Upgrades to the temporary barrier and the construction of a second, permanent multi-million dollar electric barrier, to ensure a greater degree of protection, was to begin in the fall of 2004 and is to be completed in late 2005 or early 2006.

In October 2004, Ontario's Minister of Natural Resources announced his intention to develop an Ontario biodiversity strategy, which would be useful in, among other things, "halting the spread of invasive species." Finalized in June 2005, this strategy will be reviewed by the ECO in our 2005/2006 annual report.

ECO Comment

The ECO is pleased that the Ministry of Natural Resources (MNR) has amended O. Reg. 664/94 under the *Fish and Wildlife Conservation Act*. The amendments will play an important role in preventing the introduction and establishment of carp and snakehead in Ontario's aquatic ecosystems. It is less clear that the amendments will play a role in preventing the further spread of gobies. Bait harvesting and subsequent use by anglers may be a mode of distribution of the fish. Nonetheless, including gobies in this regulation is a prudent measure. The inadvertent capture of gobies during bait harvesting by anglers may be a means of distribution deserving further attention.

If established or further distributed, carp, snakeheads and gobies are capable of causing considerable damage to Ontario's aquatic ecosystems as well as significant economic losses, particularly to the commercial and sport fishing industries. To date, there have been no successful eradications of alien aquatic species in the Great Lakes basin and controlling established species has proven difficult and costly. Therefore, the ECO salutes MNR's preventive approach to the threat of these fish.

While a positive development, MNR should have explicitly communicated to the public that the new regulation applies to any buying and selling of the specified fish conducted by retailers, wholesalers and importers within the province. Until the federal government imposes a ban on the possession of the fish in a live state, importers are still legally able to bring the live fish into the province, killing them only at the point of sale, if payment of the fish is issued outside of the province. However, MNR believes that there is only one company that does so. Moreover, it expects that the Ontario Fishery Regulations banning the possession of the live fish in the province will be in place in the fall of 2005.

The ECO recognizes and is encouraged that MNR asked the federal government take steps to further protect the aquatic environment and that it is working with the federal government to ban the possession of the live fish within Ontario's borders.

Even though MNR did not make any of the changes requested by the commenters, there is evidence that MNR gave due consideration to most of the comments received. The ECO encourages MNR to post an information notice on the Registry to inform the public of amendments to the Ontario Fishery Regulations banning the possession of the live fish, once passed.

MINISTRY OF TRANSPORTATION

Review of Posted Decision: Environmental Protection Requirements for Transportation Projects

Decision Information:

Registry Number: PE04E4551	Comment Period: 45 days
Proposal Posted: April 30, 2004	Number of Comments: 1
Decision Posted: August 23, 2004	Decision Implemented: August 2004

Description

In August 2004, the Ministry of Transportation (MTO) finalized a summary of the numerous federal and provincial environmental laws, policies and guidelines that currently apply to highway projects in Ontario. MTO entitled this summary "Environmental Protection Requirements for Transportation Planning and Highway Design, Construction, Operation and Maintenance" (EPR). The EPR does not represent a change in the application of the laws or policies, but it is MTO's interpretation of how they apply to highway and road projects.

Background

The EPR summary is an early step of a much larger project that MTO initiated in 2002, called the Environmental Standards Project. The Environmental Standards Project is intended "to improve the way the ministry assesses environmental risk and controls the environmental impacts resulting from its activities." MTO's website explains that it has, over the last 20 years, shifted from hands-on highway construction and maintenance to a role of managing contractors that plan, build and maintain highways on behalf of the ministry. At the same time, there have been changes in environmental rules and public expectations, and there has also been an evolution in environmental practices. Thus MTO has seen "a need to develop a consistent, systematic approach to meeting our commitment to the environment…"

Under the banner of the Environmental Standards Project, MTO plans to publish or finalize several key documents by the spring/summer of 2005:

- Environmental Protection Requirements (the subject of this decision review)
- Environmental Protection Requirements: Oak Ridges Moraine (proposal posted August 23, 2004)
- Environmental Best Practices for Highway Design
- Environmental Best Practices for Highway Construction
- Measures For Environmental Performance

MTO hopes that the Environmental Standards Project will bring benefits not only to the ministry itself, but also to environmental regulatory agencies and to the public. Among other things, the ministry is expecting more timely completion of projects, better relations with the public and other agencies, and improved environmental stewardship. MTO also expects the public to benefit from a healthier environment, more opportunities to view and comment on environmental standards and greater transparency in transportation planning, design and construction. MTO staff have explained that the key mechanism for greater transparency will be to post components of the Environmental Standards Project on the Environmental Registry.

The ECO has a strong interest in this MTO project because our office has heard many concerns in recent years about the environmental impacts of highway projects, and the challenges faced by Ontario residents who want to comment on these projects. For example, the ECO's 2003/2004 annual report included an investigation of a highway construction project where environmental protection and mitigation work was not carried out as required. Taking a province-wide perspective, the ECO's 2002/2003 annual report highlighted the great pressure on aggregate resources caused by road construction, and the impacts of aggregate extraction on the environment. This year's Supplement also briefly describes two separate applications from Ontario residents, both arguing that MTO should be legally subject to applications for review under the *Environmental Bill of Rights*, since the ministry's activities have significant environmental impacts (see page 241 and pages 258-259 of this Supplement).

Content of the EPR Summary

The EPR is a 17-page summary of how federal and provincial environmental laws and policies apply to MTO's transportation projects, and groups the issues into numerous sub-headings such as agriculture, fisheries, surface water, wildlife and wetlands. The summary notes that 74 separate statutes have been identified as applicable, and that some have overlapping or complementary requirements. The ministry has interpreted how each law, regulation and policy applies to transportation projects, and states that there has been consultation with various regulatory agencies to develop a common interpretation.

The 2005 Provincial Policy Statement states that development and site alteration will not be permitted in provincially significant wetlands across a broad area of Ontario or in significant portions of the habitat of endangered and threatened species. But the EPR summary indicates that such activities can be permitted for highway planning and construction activities, if they are approved under the Environmental Assessment (EA) process. For example, the EPR summary indicates that the encroachment on significant portions of the habitat of threatened and endangered species and the loss of wetland features and functions could both be approved through the EA process, in spite of the *Planning Act*.

The EPR summary does acknowledge that highway planning and construction must avoid habitat of species designated by regulation under the *Ontario Endangered Species Act* (s.5). However, as noted on pages 280-285 of this Supplement, only a small number of species are actually regulated under this Act. In fact, about three quarters of the total number of species currently found on MNR's "Species at Risk in Ontario" list are not designated by regulation, and thus it appears their habitat is not protected from highway planning and construction.

The EPR summary also asserts that many other potentially environmentally damaging activities could be approved under MTO's environmental assessment processes, including:

- Encroachment on significant woodlands and significant valleylands, including woodlands providing habitat for area sensitive species;
- Encroachment on designated areas such as National and Provincial Parks, World Biosphere Reserves, Provincially Significant Areas of Natural and Scientific Interest, etc. (in such cases, highway design and construction would be done in a manner to minimize intrusion and visual impacts); and
- The reduction in diversity of wildlife habitat and the loss of natural connections between habitat areas.

MTO's Approach to Surface Water Protection

Among other things, the EPR summary itemizes the numerous federal and provincial laws and policies applicable to surface water protection. These include:

- the *Canadian Environmental Protection Act*
- the *Ontario Environmental Protection Act*
- the *Fisheries Act*
- the *Ontario Water Resources Act*
- the *Conservation Authorities Act*
- the *Planning Act* and the Provincial Policy Statement
- the *Lakes and Rivers Improvement Act*
- Common Law (court decisions)

According to MTO's interpretation, these disparate pieces of legislation can be boiled down to the following common language: surface water values (including quality, water balance, erosion potential, human and non-human uses) are to be protected or potential damage mitigated "to the extent that is technically, physically and economically practicable, as defined through the Environmental Assessment approval process." This suggests that the EA approval process is able to trump all other legislative requirements that might otherwise apply. For example, although the federal *Fisheries Act* uses very clear language to prohibit the discharge of a deleterious substance into water frequented by fish, MTO has evidently determined that this applies only insofar as it is "technically, physically and economically practicable."

Some issues still in development
The EPR summary notes that the ministry is still working on a compilation of protection requirements for two environmental issues: air quality and the Oak Ridges Moraine. With regard to the Oak Ridges Moraine, MTO subsequently posted proposed environmental protection requirements for this region (under Registry number PE04E4552), and provided a 60-day comment period, from August 23 to October 22, 2004.

Implications of the Decision
Although the EPR summary does not intend to set new policy for MTO, it does raise at least three important questions.

1. *Does MTO's EA Process Have Precedence Over Other Environmental Legislation?*
The EPR summary suggests that the EA approval process has primacy over most other environmental legislation. In practice, almost all of MTO's transportation projects are carried out under the umbrella of the MTO Class EA ("Class Environmental Assessment for Provincial Transportation Facilities"). But as outlined in this year's annual report on page 114, this Class EA document states quite clearly that it is not intended to replace or supplant other environmental legislation. Furthermore, while the Class EA does list "environmental protection principles," it does not contain any specific prohibitions or constraints that could provide anywhere near the same environmental protection afforded by the *Fisheries Act*, the *Environmental Protection Act* or other key environmental legislation. The *Fisheries Act* in particular sets out a very clear prohibition against the destruction of fish habitat unless an authorization has been received from the Federal Department of Fisheries and Oceans (DFO). Approval through a provincial Class EA would not be an adequate substitute. Summarizing, it is the ECO's understanding that it would be erroneous to interpret MTO's Class EA as having primacy over other environmental legislation. Indeed, while the courts have ruled that environmental approvals may provide evidence of due diligence, they do not relieve proponents of their obligations to comply with laws. The EPR summary is seriously flawed to the extent that it conveys this interpretation and should be revised, especially since the intent of the document is evidently to provide guidance to staff, contractors and stakeholders.

2. *How does the Provincial Policy Statement (PPS) Apply to MTO?*
The PPS, issued under section 3 of the *Planning Act*, provides policy direction on matters of provincial interest related to development and land use planning. Between 1996 and early 2005, decision makers were required to "have regard to" the PPS when making land use decisions.

Considerable effort and public consultation has gone into the 2004 review of the PPS (see pages 39-47 of the 2004/2005 annual report and pages 136-151 of this Supplement), and considerable weight has been placed on the new stronger language in the *Planning Act*, which states that decisions affecting land use planning matters "shall be consistent with" the 2005 PPS. There are great expectations that this stronger language will encourage more sustainable land use planning decisions, especially because it appears to apply so sweepingly to "all decision makers when making decisions on land use planning matters affecting provincial interests." Indeed, in some arenas, there are likely to be changes for the better.

However, this stronger language may fail to place many practical constraints on MTO activities because of an exemption, which operates as follows: under the PPS, "development" is defined as *not including* activities that create infrastructure authorized under an environmental assessment process. In plain language, highways and similar infrastructure are not considered development, and therefore are not subject to the constraints that the PPS imposes on other kinds of development.

Somewhat ironically, it appears that the genesis of this exemption dates back in part to the 1993 Sewell Commission, which wanted to encourage public transit and full sewer services in the context of municipal planning. The Sewell Commission saw a need for municipalities to include general infrastructure servicing schemes into their Official Plans, and advised that the planning process and the environmental assessment process should work in tandem. However, with a change in government, official interest in public transit waned and Sewell's concept of integrating planning and EA processes was never fully resolved. Instead, the PPS states somewhat vaguely that "An environmental assessment process may be applied to new infrastructure and modifications to existing infrastructure under applicable legislation. The applicable policies would be considered as part of the authorization process for the undertaking."

In summary, MTO's exemption from the PPS is not overt, nor absolute, since the *Planning Act* applies to Crown ministries. As evidenced by the Environmental Protection Requirements document, MTO does acknowledge that the PPS is relevant to its activities, since it is cited in at least eight separate instances.

3. *How Does Other Land Use Planning Legislation Apply to MTO?*

Two other recent land use plans contain exemptions for transportation infrastructure in their definitions of site alteration. Under the proposed Greenbelt Plan and the Oak Ridges Moraine Plan, approved in 2002, the term "site alteration" would not include "the construction of facilities for transportation, infrastructure, and utilities uses by a public body." These wholesale exemptions for transportation infrastructure mean that the status-quo will continue to apply to highway planning, despite the new *Greenbelt Act* and the Oak Ridges Moraine Plan. Critics argue that this will profoundly undermine the land use planning reforms currently underway, by encouraging sprawling urban development patterns to leapfrog across protected areas.

Public Participation & *EBR* Process

MTO posted the Environmental Protection Requirements on the Environmental Registry as a policy proposal with a 45-day comment period. The notice included a direct hypertext link to the EPR document, and provided a clear description of the work, the rationale and the surrounding context. Only one comment was received on this proposal, which MTO accurately described as not relevant, since the letter was primarily concerned with the deregulation of Highway 652 near Cochrane in northern Ontario.

In May 2004, MTO also posted an information notice (XE02E4550), outlining the key elements of the broader Environmental Standards Project, and providing a 45-day comment period. With regard to this larger project, MTO says that consultations with four federal and six provincial regulatory agencies are ongoing, including the Department of Fisheries and Oceans (DFO), Environment Canada, the Ministry of the Environment and the Ministry of Natural Resources. MTO also plans to continue using the Environmental Registry to solicit comments from the public on key documents produced under the larger Environmental Standards Project.

SEV

MTO's Statement of Environmental Values (SEV) is more than ten years old, and is due to be reviewed and updated. Nevertheless, the SEV does include a number of strong and valuable commitments relevant to the ministry's mandate, including the following statements:

- the ministry will seek to reduce transportation-related air emissions

- the ministry will seek ways to reduce transportation-related discharges of contaminants to water
- transportation will be planned with a view to conserving and preserving lands whenever possible and practical
- the ministry will strive to create an environmentally skilled and informed workforce.

MTO documented how ministry staff considered its SEV during the decision-making on the Environmental Standards Project, of which the Environmental Protection Requirements is a component. The SEV consideration document notes that as a consequence of this policy, the ministry and its contractors will have a clearer understanding of their legal obligations to comply with environmental laws, policies and guidelines. As well, the public will be able to access the compiled information on MTO's website, and will be able to provide feedback through an e-mail link, which should aid public participation. The SEV consideration document also notes that the Environmental Protection Requirements will "endeavour to promote the wise use and conservation of materials in highway design and construction." Finally, the SEV consideration states that the ministry will develop training programs to raise the awareness of ministry staff and partners about the ministry's environmental commitments. In the opinion of the ECO, these outcomes would all support and conform with the ministry's SEV.

Other Information
The ECO's 2003/2004 annual report highlighted a case of environmental damage during the construction of a highway in the Muskoka region, undertaken by a contracting company on behalf of MTO. The ECO has learned that this is not an isolated case. Because of inadequate or even nonexistent compliance monitoring, carefully drafted commitments to environmental protection and mitigation can often fall by the wayside during the actual construction phase of highway projects.

Even though a project may have originally budgeted for safeguards such as full-time on-site environmental inspectors, proper placement of silt curtains and proper disposal of waste materials, there is strong pressure to take short-cuts on the ground in order to shave costs and to meet deadlines. While the resulting environmental damage is usually localized and of relatively small scale, it is also incremental and cumulative over the hundreds of large and small highway projects underway each year in Ontario. It is also very hard to reverse damage to local wildlife and fish habitat, or to remediate areas where waste has been piled or stream flow has been disrupted.

DFO, which has a mandate to protect fish habitat, does carry out compliance monitoring of highway projects that have received DFO approvals. DFO uses a principle that there should be no net loss of fish habitat, and requires proponents to compensate for any loss by creating new habitat of a comparable quality. In the Prescott area of Ontario, DFO staff have greatly intensified their compliance presence on highway projects in the last three to four years, in response to persistent problems. Among other measures, they have put in place stronger reporting requirements, have required fish habitat inspectors to be on site daily at highway projects, and have insisted that environmental inspectors be given authority on the job site. However, in other areas of Ontario, DFO has not adopted this intensive compliance approach. And importantly, DFO has a regulatory role only on sites and projects where fish habitat has been identified. Where fish habitat is not an issue, the regulatory roles fall to MNR (wetlands, wildlife) and MOE (surface water, EA compliance). Unfortunately, MNR and MOE appear to do very little or no compliance monitoring of highway projects at the construction or post-construction phase.

DFO staff have described an urgent, widespread need for training of highway construction staff on how to prevent and minimize environmental damage during construction. Both MTO's own staff who tender and oversee construction projects, as well as the contract administrators and the contractors' workers who operate the machinery at the job sites are in need of this training. Training standards that reflect the necessary skill sets for environmental inspectors also need to be developed and incorporated into MTO contracts.

ECO Comment

The EPR summary is a useful exercise, since it generally clarifies for staff, regulatory agencies and the public how MTO interprets the prevailing environmental regulatory scheme. At the same time, the legal interpretations of the EPR summary do raise significant concerns, namely that MTO apparently considers the Environmental Assessment approval process to have primacy over virtually all other environmental legislation and policy, and that MTO does not consider itself bound in any substantial way by the PPS. In the view of the ECO, these interpretations serve the environment very poorly. Indeed, proposed highway routes sometimes seem to exhibit a pattern of connecting "green dots" on the landscape, a consequence of weaker protection being afforded to natural heritage areas than other land uses. MTO should reconsider these interpretations, in consultation with key regulatory agencies and the public.

Aside from this major concern, the EPR summary will need frequent reviews and updates to remain abreast of ongoing major changes in land use planning legislation and policy. As environmental rules are updated and strengthened, MTO also needs to provide ongoing training to its staff and contractors to make sure the new rules are implemented.

MTO's overarching Environmental Standards Project is a promising development that could focus the attention of MTO front-line staff and senior management on improvements needed in the way the ministry approaches environmental protection. The proposed "best practices component," if widely adopted by ministry staff and contractors, could advance MTO's environmental stewardship. Similarly, the "measuring environmental performance" component could help the ministry develop action plans and targets, which could foster buy-in among MTO's engineering staff and contractors.

Overall, the Environmental Standards Project could go a considerable way towards addressing some of the long-standing concerns with MTO's traditional approach to highway planning, construction and maintenance. But the ECO cautions that some of the project's bolder promises (such as a healthier environment and greater transparency) can only be realized if the ministry is open to real internal change. At a minimum, MTO would need to be willing to change some of its own internal processes, including its EA processes, and would need to provide intensive training for its planning and design staff and its construction engineers. Training for the front-line workers of the construction contractors is also a key need. As of November 2004, the ministry recognized "areas of knowledge deficiency" within the ministry, and was contemplating some form of training. The ECO will continue to monitor the roll-out of further policies planned under this project.

SECTION 5:

ECO REVIEWS OF APPLICATIONS FOR REVIEW

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MINISTRY OF THE ENVIRONMENT

Review of Application R0334:
Classification of Chromium-Containing Materials as Hazardous Waste
(Review Undertaken by MOE)

Background/Summary of Issues
The applicants requested that Regulation 347 under the *Environmental Protection Act* be reviewed. Under the current regulation, a waste is considered toxic if the total chromium extracted from it during a leachate test exceeds 5 mg/L. The applicants said the legislation should differentiate between toxic and non-toxic forms of chromium. Treating a non-toxic material as hazardous places an unnecessary economic burden on industry.

Ministry Response
MOE decided in 1996 to conduct a review.

In December 1997, MOE told the ECO that proposed changes to a federal Transport Canada regulation will deal with this issue. MOE indicated that in the interests of federal/provincial harmonization work, and to avoid duplication of effort, it was waiting for the federal regulation to be finalized before doing its own review.

In December 1998, MOE indicated that this review would be part of the national harmonization initiative review related to the definition of hazardous waste. The ministry stated that it exercises no control over the timing of this federal initiative.

In May 2005, MOE updated the ECO, indicating that the applicant is still interested in pursuing the review, and that the federal government is still reviewing these standards.

ECO Comment
While the nine-year delay in completing this review seems unreasonable, ECO recognizes that MOE progress is linked to federal initiatives on hazardous waste regulation. The ECO will continue to seek updates from MOE on this process.

Review of Application R2003009:
Review of Public Notice and Signage Rules under Ontario's *Pesticides Act*
(Review Undertaken by MOE)

Background/Summary of Issues
In November 2003, the applicants requested a review of section 70 of Regulation 914 R.R.O. 1990 under Ontario's *Pesticides Act*. Section 70 sets out rules for public warning signs which must be posted in residential areas when pesticides are applied to land. The applicants requested that the Ministry of the Environment (MOE) clarify and strengthen s.70. They noted that due to the potential health risks posed by pesticides, the methods of providing notice must be effective.

Section 70 of Regulation 914 states that "Residential area signs giving public notice of a land extermination shall be posted conspicuously at least every 100 metres along these parts of the perimeter of the application area that are, at all points, (a) within 100 metres of a dwelling unit, other than a dwelling unit within the application area; and (b) adjacent to a highway or other area to which the public is ordinarily admitted." Signs, which are approximately the size of an 8½ by 11 piece of paper, must be posted within 10 metres of the perimeter of the property. This is similar to the approach that is used for giving notice of land use planning changes and building permits. However, these land use planning changes and building permit signs are much larger.

The applicants provided their interpretation of s. 70 in their submission. According to them, s.70 requires that "a sign must be posted conspicuously at least every 100 metres along all four boundaries of the perimeter that are within 100 metres of a dwelling unit, other than the dwelling unit within the application area." The applicants pointed out that residential lots generally have three abutting properties and at least one lot directly across the street.

The applicants noted that pesticide applicators tend to operate according to a different interpretation of s.70. Applicators usually only post one notice along the front boundary of the property being sprayed. As boundaries shared with other property owners are usually not posted, applicators "fail to provide fair warning to the inhabitants of those dwellings." The applicants implied that if the pesticide applicators' interpretation of s.70 is correct, the regulation should be amended to require that all shared property boundaries be posted.

The applicants also suggested that pesticide applicators may interpret the word "conspicuous" in a range of ways, and this discretion can affect exactly where a sign is placed along a boundary. As there are different kinds of residential environments with varying kinds of plant and tree coverage – for example, new subdivisions with no trees versus old subdivisions with mature trees – the regulation should provide greater direction on what constitutes a "conspicuous" posting.

In addition to requesting that the regulation be clarified, the applicants also stated that it should be strengthened to require that pesticide applicators attempt to notify neighbours in person prior to spraying. In the absence of a response, applicators should be required to leave warning notices at the door of adjacent properties.

The applicants provided evidence – including a personal case history, photos and a report from the Saskatchewan Department of Agriculture – in support of their request for review. The personal case history related how the applicants, who live in a suburban neighbourhood in Oakville, believed the shortcomings of the regulation had impacted them. In mid-August 2003, a commercial pesticide applicator had sprayed Cygon, an organophosphate insecticide, to deal with an infestation of a cedar hedge and trees on an adjacent property. Cygon is classified as a Schedule 2 pesticide under the *Pesticides Act*, as it is deemed both toxic and persistent. The applicants stated that Cygon was under review by the federal Pest Management Regulatory Agency (PMRA). As the applicator did not personally notify the applicants or post signs that were visible to them, the applicants were unaware that the adjacent property had been sprayed with a toxic pesticide.

Within two weeks of the spraying, the applicants' dog became extremely ill, suffering from a number of conditions including loss of control of motor abilities, high fever and dehydration. The dog also passed blood. After a veterinarian determined that the cause was likely poisoning and the outcome terminal, the dog was put to sleep. According to the applicants, the dog's symptoms were identical to the symptoms of Cygon poisoning, as documented in the Saskatchewan Department of Agriculture report.

Shortly thereafter, the applicants learned that a cat, belonging to a neighbour whose property abutted the back of the sprayed property, suffered from many of the same conditions and was also put down around the same time as the applicants' dog. The applicants stated that they had also noted the disappearance of songbirds in their garden after the time of spraying.

It wasn't until after their dog had died that the applicants became aware that the spraying had occurred. To find out why they had not been notified, the applicants contacted the pest management company. The company responded that the pesticide applicator had posted a warning sign on the sprayed property. The applicants – whose home is on a corner lot, around the corner from the sprayed property – speculated that the sign was likely placed at a location that would only have been visible to them had they walked down the street to the property boundary and looked around the corner. The applicants were certain that no signs were posted along the shared property boundary of the large property lots in the area. Nor were the applicants, who were at home all day on the day that the spraying occurred, notified in person or in writing.

The applicants consider it fortunate that young children who were playing outside on adjacent properties on the day of spraying appear to be healthy. However, they believe that the loss of pets could have been avoided had the pesticide applicator provided adequate notice.

Ministry Response

MOE acknowledged receipt of this application on December 3, 2003 and on February 10, 2004, advised the applicants that the ministry would undertake the review. MOE's February 2004 letter indicated that the review would take one year to complete and that the ministry would provide the applicants with a report on the outcome one month after its completion.

MOE's report on the outcome of the review, forwarded to the applicants and the ECO on March 14, 2005, stated that the ministry had decided not to revise the regulation. The two-page decision summary indicated that the ministry believes that, as it currently stands, the s.70 requirement fulfills the objective of providing "reasonable notification to the public and information about the application of pesticides." MOE also stated that the intent of the section is "to provide notice to the public, particularly pedestrians to make an informed decision whether to enter an area treated with pesticides." The ministry explained that it did not believe that additional forms of notification, such as those proposed by the applicants, would serve to better protect the public or the environment.

MOE explained that the review was conducted by the ministry's Standards Development Branch (SDB), with input from the ministry's Operations Division and the Ontario Pesticides Advisory Committee (OPAC). A discussion paper outlining options for consideration, including those suggested by the applicants, formed the basis of the review. The paper focused on and solicited comments on whether "the intent of providing notification was clear."

In the final section of the report, MOE discussed the history of and rationale for s.70 of the pesticide regulation. The ministry stated that the notification requirements were introduced in 1990 and reiterated that their purpose was to allow "the public to make a personal choice whether to avoid or enter areas where pesticides have been used." According to the ministry, written input from a broad range of stakeholders was considered prior to the promulgation of the regulation. MOE also noted that amendments to the regulation had been made since it was passed – in 1992 (extensive in nature) and again in 1998 (minor in nature).

MOE's decision summary closed with a plain language explanation of the requirements of s.70 of Regulation 914. In doing so, the ministry clarified that the regulation does not require the posting of all boundaries of a sprayed property. According to the ministry, a "commercially licensed exterminator must post at least one sign at the perimeter of the property which borders a road or sidewalk, usually at the front of the property and additionally along the side of a property if it is a corner lot."

ECO Comment

The ECO is pleased that MOE agreed to undertake this review. MOE clearly explained the outcome of the review – that it would not be amending s.70 of Regulation 914 under the *Pesticides Act* to either clarify or strengthen it – and provided a helpful explanation of the correct interpretation of that section.

However, the ECO finds the lack of detail in the ministry's two-page response disappointing, given the fact that the review took over a year to complete. The ministry could have done a better job of explaining how it came to the conclusions that it did. The decision summary stated, "The ministry considered additional forms of public notification…and was not convinced that these forms would better protect the public or the environment." But MOE did not explain why it was not convinced. It didn't indicate whether it believed that the current s.70 notification requirements are as effective as any new requirements could be. Nor did it indicate whether it believed that the risks to residents are negligible. In addition, MOE failed to describe any of the information or evidence that was considered in reaching its conclusion.

The ministry also failed to explain how it determined that the current notification requirements provide "*reasonable* notification to the public" (italics added). It did not indicate whether the ministry's review involved a comparison of the s. 70 requirements to provisions regarding notice in other jurisdictions' pesticides legislation. It did not clarify what standard of reasonableness was applied or what sectors of society would consider additional requirements as unreasonable.

In a conversation in April 2005, MOE informed the ECO that three scenarios had been considered: (a) maintain the status quo; (b) provide written notice immediately before application; and (c) provide written notice 24 hours prior to application. The ministry explained that the last two options were deemed inappropriate due to the significant use of resources they would entail. In particular, option (c) would require additional gas consumption, leading to extra costs, time on the part of applicators and air pollution. Moreover, MOE indicated that it was not convinced that written notice would be effective, as papers delivered to the door tend to be ignored. MOE should have conveyed this information to the applicants in its decision summary.

Evidently, MOE considered only two options for strengthening posting requirements, and rejected both without a transparent decision-making process. Had the ministry considered a broader range of options, some practicable improvements could have been devised. Such options might have included: verbally alerting neighbours by knocking on their doors; hanging notices on door handles when doors are not answered; and requiring conspicuous posting on all four boundaries of the property, as suggested by the applicants.

Moreover, the words "effective" and "effectiveness" were notably absent from the ministry's response despite the fact that the alleged ineffectiveness of the current notification provisions was the primary concern of the applicants. The ministry did not offer the applicants any evidence or information regarding the effectiveness of the current signage rules or explain why the applicants' situation might have been exceptional. While MOE's report did indicate that the ministry's Operations Division was consulted regarding the need to modify the regulation, the report did not specifically indicate that field staff were involved. In addition, MOE did not indicate that it tracks public complaints related to pesticide spraying by commercial applicators.

In conversation with the ECO, MOE explained that the ministry's Kingston Regional Office, which has expertise in issues relating to pesticide use, was consulted. MOE indicated that in supporting the decision to retain the current s. 70 requirements, the regional office drew on its own on-the-ground experience and consulted MOE's new computer database which tracks complaints regarding pesticide issues. MOE should have revealed this information to the applicants. An explanation of how the regional office's experience and the information retained in the database support MOE's position that it is unnecessary to amend s. 70 also would have been helpful.

It is also noteworthy that MOE's statement on the intent of the regulation did not specifically highlight the importance of protecting nearby residents and their pets from pesticide applications. MOE emphasized the need to provide adequate notice to the public, "particularly pedestrians to make an informed decision whether to enter an area treated with pesticides." Since young children and pets cannot read signs, it is essential that MOE take a precautionary approach to signage and notice. Yet, the applicants' concerns clearly focused on the adequacy of the notice provisions of the regulation for nearby neighbours who may not observe a sign if they do not have reason to walk by the front of the sprayed property. If they do not observe the sign, as was the case with the applicants, they are not in a position to choose to take precautions. They may engage in activities outside or inside their homes with windows open, during and after the spraying which they might not have done if they were aware of the spraying.

The ECO questions the ministry's focus on the need to protect passersby and its apparent failure to fully consider and address the exposure of neighbours who may have concerns. Pesticide drift and the levels of pesticides in the surrounding environment resulting from an application may be negligible and should pose only minimal or "acceptable" risk levels if application is done according to the label instructions, as regulated by the federal Pest Management Regulatory Agency (PMRA), and MOE's guidance to applicators provided in its training manuals. Nonetheless, even under the best conditions, some level of exposure to nearby residents is likely. It is impossible to completely eliminate drift during spraying and otherwise prevent the movement of pesticides through various environmental media post-application. MOE's response did not acknowledge these points either explicitly or implicitly.

Having decided not to amend the Regulation 914, the ministry could have directed the applicants to the federal PMRA for further information regarding the toxicity of Cygon and its re-evaluation status.

The cosmetic use of horticultural pesticides in urban settings is an issue of considerable public debate and concern, as evidenced by the number of municipalities that have enacted by-laws to control this practice (see ECO's 2001/2002 annual report, page 81). In light of this, it is quite possible that MOE will have to revisit the adequacy of its pesticide signage and notice rules in coming years.

Review of Application R2002001: Review of Policies for Landfill Leachate Treated at Sewage Treatment Plants (Review Undertaken by MOE)

Background/Summary of Issues

In May 2002, the ECO received an application requesting a review of provincial policies governing the discharge of landfill leachate into sewage treatment plants. The application was co-signed by the former MPP for Stoney Creek, Brad Clark, who was also Ontario's Minister of Labour at the time. In interviews with local media, Mr. Clark explained that "the ministry bureaucrats since 1994 in my community have allowed and looked the other way while the city of Hamilton accepts fees for receiving industrial effluent and landfill leachate directly into the sewage system, and the sewage system does not treat it." The applicants were prompted to submit their request in part by the City of Hamilton's decision to let the Taro east quarry landfill hook into the sewer system – the seventh local landfill to pipe its leachate to Hamilton's main sewage treatment plant, the Woodward Avenue plant. More recently, the leachate from an eighth landfill site has been added to this system.

Although the impetus for this application was clearly the City of Hamilton's approach to dealing with landfill leachate, the applicants formulated their concerns much more broadly, and requested a province-wide review of laws and policies that regulate the management of landfill leachate, including:

- The *Ontario Water Resources Act*, including provisions for Certificates of Approval for sewage treatment plants (section 53);
- The Municipal Industrial Strategy for Abatement under the *Environmental Protection Act*; and
- MOE's Policy 08-06, "Policy to Govern the Sampling and Analysis Requirements for Municipal and Private Sewage Treatment Works."

The applicants also requested that the ministry review the following as they pertain to public consultation on sewage/waste water treatment plant agreements:

- MOE's Model Sewer Use By-law; and
- Bill 107 – *Water and Sewage Services Improvement Act.*

The applicants argued that the existing regulatory mechanisms are not adequate to address the water quality and environmental health problems associated with the discharge of landfill leachate to sewage treatment plants. The applicants stated that sewage treatment plants are not designed to treat leachate. They also stated that: pre-treatment and/or prior testing should be done before landfill leachates are discharged to sewage treatment plants; all discharge agreements should be made public; and overstrength or compliance agreements allowing leachate to exceed sewer use by-laws should not be permitted. To support their argument that municipal sewage treatment plants are not effective in treating landfill leachate, the applicants attached a number of papers published in peer-reviewed scientific journals, all detailing the technical challenges of treating landfill leachate, and also describing the presence of toxic substances that are resistant to treatment such as nitropolyaromatic hydrocarbons, benzene and naphthalene sulfonates. The ECO forwarded this application to the Ministry of the Environment (MOE).

Impacts of Leachate on Sewage Treatment Plants

Landfill leachate is water that has percolated through the waste material of a landfill site, and that seeps from the sides or the base of the landfill. As this water percolates, it accumulates a wide range of substances in solution, and becomes wastewater. To prevent leachate from contaminating surface or groundwater, many landfill sites are required to install leachate collection systems, which collect the liquid through perforated pipes installed around the perimeter and base of the site and transport it to a location where it can be treated. Leachate characteristics can vary significantly, and depend on many factors, especially the type of waste, the age of the landfill, the season, the hydrogeology, the flow rate and the characteristics of the infiltrating water. Because of the complexity and variability of leachate composition, it can be very challenging to treat.

Surveys of municipal solid waste landfills in the U.S. have shown that their leachate can normally be expected to contain a variety of toxic and possibly carcinogenic chemicals. Indeed, some studies using bioassays suggest that the leachates of municipal solid waste landfills may be as acutely and chronically toxic as the leachates from landfills receiving hazardous wastes.

In 1995, MOE published a summary of treatment technologies for landfill leachates, which noted that "no reliable method has been developed to forecast the exact composition of leachate from a particular landfill at a particular time," and noted the importance of monitoring the quality of leachate discharged from leachate collection systems. The age of the landfill is an important factor. As a given landfill ages over time, its leachate characteristics tend to change in some predictable ways: the pH changes from acidic towards neutrality; high nitrate levels decrease, but ammonia levels increase as nitrogen is converted to ammonia; and total dissolved solids, volatile acids and biochemical oxygen demand all decrease over time. The leachate from a given landfill may require treatment for decades after landfilling has ceased.

Thus, methods of leachate treatment that may be effective for a "young" landfill's leachate may not be appropriate for leachate from an old landfill. A wide range of treatment technologies are available, including activated carbon adsorption, precipitation, lime treatment, membrane processes, a variety of biological treatments and nitrogen removal.

A common treatment choice for landfill leachate is to add it to municipal sewage at a municipal sewage treatment plant either through sewer hook-up or through truck hauling. The key question raised by this *EBR* application is whether this method of treatment adequately protects the environment; specifically, whether the typical treatment used for municipal sewage (i.e., the aerobic activated sludge process) can effectively biodegrade toxic contaminants found in landfill leachate, or whether these contaminants are simply diluted and destined either for release to the waterway or for accumulation in sewage sludge. The U.S. Environmental Protection Agency (USEPA) has noted that some contaminants are known to be nonbiodegradable aerobically. Furthermore, the USEPA has noted that the aeration stage of municipal sewage treatment may drive off volatile organic compounds as air emissions. With this in mind, residents have raised concerns for some time about the potential for health impacts from air-borne contaminants volatilized during sewage treatment near Hamilton's Woodward Avenue sewage treatment plant.

Sewage treatment plants may also be challenged by the very high levels of ammonia nitrogen commonly found in older landfill leachates. In fact, MOE's 1993 "Guidance Manual for Landfill Sites" ("the Manual") notes that the use of municipal sewage treatment to address the nitrogen levels common to this type of leachate "is not effective as generally nitrogen will not be removed at the treatment plant, but will continue to be present in the final effluent." Older leachates may exhibit ammonia concentrations of 2,000 mg/L or more, while untreated municipal sewage typically may have ammonia concentrations of only about 25 mg/L.

An additional concern is related to the fact that many older municipalities have combined sewers, which are prone to discharging untreated sewage to waterways during storms. Depending on their location, there is a risk that combined sewer overflows may release relatively undiluted landfill leachate to waterways during storm events.

Approximately 30 sewage treatment plants in Ontario receive leachates for treatment. Typically, the leachate represents a small percentage of the total waste flow received by the plant; up to 0.8 per cent, but on average 0.2 per cent of total plant flow. This is important because some Ontario studies indicate that increasing leachate above 1 or 2 per cent of total plant flow can increase sludge production, while increases beyond 5 per cent can affect plant performance, as evidenced by substantial increases in sludge production, increased oxygen uptake rates and poor sludge settling.

Existing Rules for Landfill Leachate

Under the existing regulatory structure, landfill leachate may be considered "sewage" under the *Ontario Water Resources Act*. MOE's 1993 Manual notes that "municipal and/or MOE approval is required and care should be taken to ensure that the leachate will not adversely affect the efficient operation of the sewage treatment plant." The Manual also notes that leachate treatment and disposal schemes need to be evaluated by leachate characterization and pilot scale testing, and warns that "more stringent treatment requirements may be forthcoming. For example, contaminants in the leachate may not affect plant performance, but may pass through the plant and, without removal, be discharged in the effluent." Thus MOE acknowledged 12 years ago that some contaminants in leachate may pass through sewage treatment plants untreated and be released to surface waters.

There are also concerns about transparency and accountability in cases where a municipality owns both the landfill sites and the sewage treatment plants. In such cases, the municipality may in effect give itself approval to discharge landfill leachate to the sewer system; an expedient, but perhaps not always appropriate solution. It is also unclear to what extent or even whether the quality of landfill leachate is monitored on an ongoing basis after discharge approvals are given.

Ministry Response

On August 2, 2002, MOE informed the applicants that it would undertake the requested review, and that it was expected to be completed within 18 months. The ministry also provided a three-page overview of what the review would entail and what initiatives were already underway, and advised that stakeholders would be consulted during the review, including future notices on the Environmental Registry. Among other things, the ministry committed to reviewing its Model Sewer Use Bylaw, and to developing a Best Practices Sewer Use document, which would include the issue of public access to information on treatment. As well, the ministry noted that it was commissioning a study to explore options for setting more "stringent effluent requirements that take into consideration treatment of septage as well as landfill leachate." Over the following two years, MOE appropriately notified the applicants of several delays, and eventually mailed the completed review to the applicants on September 22, 2004.

Significantly, the ministry's review found that there was indeed a need to improve ministry policies relating to the management and treatment of landfill leachate at sewage treatment plants. The ministry noted that "it is recognized that most sewage treatment plants in Ontario are not specifically designed to treat landfill leachates." The ministry also explained that since sewage treatment plants are primarily designed to treat sanitary sewage, their effluents are required to comply only with a few conventional parameters, including five Day Carbonaceous Biochemical Oxygen Demand (CBOD5), Total Suspended Solids (TSS) and Total Phosphorus (TP). In other words, sewage treatment plants are not designed to treat persistent organic compounds, toxic metals and many other contaminants routinely discharged to sewers. These substances are not normally monitored in the effluents of sewage treatment plants, and there are no legal limits to control their discharge to the environment. For a related overview of the fate of pharmaceuticals discharged to sewers, see pages 179-185.

The ministry's review did note that disposing of leachate to sewage treatment plants was not predicted to impact final effluent quality in cases where plants have been upgraded to provide full nitrification, and where the shock-loading of leachate is avoided. Full nitrification is a process that encourages the biological conversion of ammonia to nitrate/nitrite. But the ministry's response did not mention that while some Ontario sewage treatment plants (such as Guelph) have full nitrification, it can be an expensive upgrade, and is not widespread. The ECO is not aware of any MOE requirement that full nitrification be a pre-condition for sewage treatment plants to receive leachate.

The ministry's response committed to a number of steps, beginning with a one-year program to sample landfill leachates and effluents. MOE staff have since provided the ECO with some detail regarding this sampling program: it will involve sampling of leachate at 29 landfill sites, and sampling of effluent at 47 sewage treatment plants, with samples collected four times over a one year period, to help assess seasonal effects. The parameters sampled will include a wide range of organic compounds, including volatile organics and persistent organics as well as conventional pollutants. Sampling is to be completed by October 2005, and the analysis and interpretation should be wrapped up by mid-2006. Whether the ministry will publish the results remains undetermined, although a summary report might be contemplated.

MOE's response also committed it to revising several ministry policies, notably F-5, which deals with treatment levels of sewage treatment plants, and also F-10 (formerly known as Policy 08-06), which addresses sampling and analysis requirements for sewage treatment plants. The ministry stated that F-5 and F-10 would be revised so that landfill leachate would be considered in the design and operation of treatment facilities, including the requirements for effluent quality, sampling and monitoring. The ministry expected that public consultation on these policies would occur in fall 2004, but in February 2005 staff advised the ECO that spring 2005 is a more likely release date.

MOE also noted that when municipalities apply for a C of A for a new, expanded or altered sewage treatment plant, existing rules already require an indication of what types of waste streams (other than sanitary sewage) are to be treated. In some cases, municipalities are required to conduct desktop design analysis or bench/pilot-scale studies in support of their application. This allows MOE to assess the impact of landfill leachate in cases where it is being co-treated by a sewage treatment plant. MOE staff has advised the ECO that this existing requirement is being strengthened, and that MOE expects improved collaboration between MOE's reviewers of landfill approvals and sewage treatment plant approvals.

The ministry advised the applicants that a review of the City of Hamilton's certificate of approval for the treatment of leachate at the Woodward Avenue Sewage Treatment Plant would begin immediately, although the applicants had not specifically requested such an action.

MOE's September 2004 response did not, however, make any commitments to resolve another group of concerns raised by the applicants, i.e., the non-public nature of municipal discharge agreements and the fact that municipalities often gain significant revenues by signing overstrength agreements and compliance agreements with industrial sewer users. Through such agreements, which are authorized under the *Municipal Act*, municipalities are able to impose cost-of-service fees on industries discharging industrial wastewater into the municipal sewer system. MOE distanced itself from responsibility for these issues, stating: "The management of wastewater entering a municipal collection system is not regulated by the Ministry as the wastewater collected is not entering the natural environment." The ministry's approach instead is to focus on regulating the effluents of sewage treatment plants, and thus to indirectly influence municipal controls further up the pipe: "Through updated effluent requirements, municipalities will be encouraged to update and strengthen their sewer use by-law and initiate pollution prevention and best management practices at source so that priority organic substances are not discharged to a sewage treatment plant." It is unfortunate that MOE chose not to directly address the conflict of interest situations that can be created when municipalities collect revenues (sometimes in the hundreds of thousands of dollars) in return for allowing industrial discharges into their sewer system that exceed local by-law limits, and that in some cases include contaminants that cannot be treated at the sewage treatment plant. It may be that this issue verges into the jurisdiction of other ministries such as the Ministry of Finance and the Ministry of Municipal Affairs and Housing. In this case, MOE could have clarified whether it was consulting with these other ministries on the issue.

With regard to public consultation concerns, and requests for additional transparency in decision-making, MOE also deferred to municipal authority, stating: "Municipalities are responsible for discharges to the collection system and are in a better position to decide on the need to consult on agreements entered into with business and industry using its wastewater treatment system." This was a shift in MOE's position, since two years previously MOE had assured the applicants that "a review of the model by-law… will include the issue of public access to information on treatment."

MOE's response briefly mentioned the following two existing inter-jurisdictional commitments, but did not elaborate on their relevance, or provide details of progress in two areas:

- A commitment under the 2002 Canada/Ontario Agreement Respecting the Great Lakes Basin Ecosystem (COA) to develop a management framework for municipal sewage treatment plant discharges; and
- A commitment through the Canadian Council of Ministers of the Environment (CCME) to help develop a Canada-wide strategy for the management of municipal wastewater effluent, by December 2006.

Among other things, the applicants had cited a need to review Bill 107, the *Water and Sewage Services Improvement Act*. The ministry's response briefly clarified that since this Act deals with ownership of facilities, it is not relevant to the treatment requirements of sewage treatment plants.

ECO Comment

It is commendable that MOE agreed to undertake this review, and that the review acknowledged a need to improve policies related to the management and treatment of landfill leachate at sewage treatment plants. But it is important for context to note that the ministry was clearly aware 12 years ago of the short-comings of co-treating leachate with municipal sewage. Indeed, the ministry's manual warned proponents at the time that "more stringent treatment requirements may be forthcoming." The lack of action in the intervening dozen years to strengthen monitoring requirements or effluent standards for sewage treatment effluents is troubling. As a result, one cannot estimate the mass loadings of persistent toxic contaminants that have been released to Ontario waterways annually through this pathway. A mass loading measurement approach is important for substances that resist biodegradation and tend to accumulate in ecosystems over time. MOE's new leachate sampling project is welcome, but it should include the capability to calculate mass loadings. As well, it should not be used as a reason to further postpone the development of a stronger regulatory framework for this waste stream.

Sewer use policy is a closely related issue, and the ministry's movement on this topic has been similarly slow. Over the past dozen or more years, prolonged stalls and setbacks have plagued MOE's attempts to strengthen the regulatory and policy framework for sewer use. In the late 1980s a flagship program (the Municipal Industrial Strategy for Abatement, or MISA) intended, among other things, to strengthen sewer use controls. But the municipal side of MISA was never rolled out. (Although the applicants requested a review of MISA, the ministry's response did not touch on this topic.) In 1998 MOE posted an updated version of its model sewer use by-law as a proposal (PA8E0029), but has left this proposal undecided on the Environmental Registry for the past seven years. The ECO highlighted this unfinished business in our 2003/2004 annual report.

In August 2002, this *EBR* application prompted MOE to promise yet again:

- a review of the model sewer use by-law;
- a "Best Practices Sewer Use" document, including the issue of public access to information on treatment; and
- a study to explore options for setting more "stringent effluent requirements that take into consideration treatment of septage as well as landfill leachate."

But two years later, when the review was completed, MOE failed to update the applicants on the status of these initiatives, and as of February 2005, the ministry has not released any related proposals, studies or updates. However, MOE staff have informed the ECO that the ministry has decided against updating the 1988 model sewer use by-law, and instead plans to develop a best management practices guide for municipalities. MOE had in fact promised to do just that in March 2002, under an agreement signed with Environment Canada. But it seems action on this file was delayed until November 2004, when MOE issued a Request for Proposals as a first step toward hiring a consultant to develop the best management practices guide.

It is possible that some of MOE's more recent delays on this file have been related to jurisdictional complications arising from the federal government's decision to regulate ammonia discharges from sewage treatment plants. Municipal sewage treatment plants in Canada are estimated to release 62,000 tonnes of ammonia per year. Ammonia is not toxic in all conditions, but it can become a problem for fish and other aquatic life during warm summer months in high pH waters, since the toxicity of ammonia depends on how much un-ionized ammonia is present, and this in turn varies greatly with temperature and pH. In June 2001, Environment Canada finalized an assessment report declaring ammonia in the aquatic environment to be "toxic" as defined in s. 64 of the *Canadian Environmental Protection Act* (*CEPA*). Of particular concern are regions of up to 10 to 20 kilometres downstream from outfalls of sewage treatment plants, where ammonia can be a major factor in "severe disruption of the benthic flora and fauna."

Environment Canada followed up with a proposal in June 2003 to require sewage treatment plants above a certain size to put in place pollution prevention plans for ammonia (as well as for chlorine). Most comments received by Environment Canada opposed this approach; owners and operators of sewage treatment plants raised concerns about the costs and difficulties of managing ammonia, the possible duplication of efforts between federal and provincial jurisdictions and the need for harmonization between federal, provincial and territorial regulatory requirements. To address these concerns, Environment Canada opted instead to put in place a CEPA Guideline, expected to affect an estimated 280 sewage treatment plants across Canada, and setting standards for both acute and chronic toxicity of ammonia.

To respond to the calls for harmonization, the Canadian Council of Minister of the Environment (CCME) agreed, in November 2003, to develop a Canada-wide strategy for the management of municipal wastewater effluents, to be completed by December 2006. Environment Canada also signalled its intention to develop a regulation for sewage treatment plant effluent under the *Fisheries Act*, setting standards for specific pollutants including ammonia and chlorine. This federal move to regulate ammonia may have the effect of nudging more facilities to upgrade to full nitrification processes – the most usual solution for controlling ammonia.

Lack of Public Consultation

The ministry has assured the ECO for several years that it is engaged in a multi-year policy review to develop a management framework for municipal wastewater. The ECO is concerned that thus far, MOE's review of such a significant environmental issue has been almost wholly an internal exercise for the ministry. Although consultants have carried out background studies and surveys for the ministry in the past decade as documented in previous ECO annual reports, their results have not been released, nor has the ministry shared with the public any options or discussion papers on possible directions forward. This "black box" approach stands in marked contrast to the ministry's more transparent approach to air issues; the ongoing overhaul of Ontario's regulatory framework for industrial air emissions has variously involved discussion papers, pilot projects, public information sessions and numerous Registry postings soliciting public comment. This point is particularly relevant since MOE will soon begin consultations on implementing the *Sustainable Water and Sewage Systems Act* (formerly Bill 107), which was passed in late 2002 and has not yet been proclaimed. The ECO strongly urges MOE to consult widely as it develops proposals for regulations under this legislation.

An informed public dialogue on this issue requires, as a prerequisite, an informed public. The ECO recommended two years ago that as a first step, MOE should document and report on the quality of STP discharges to Ontario's receiving waters. This remains a key need, since the ministry last published a comprehensive overview in 1993. Certainly the ministry should post a decision on its seven year old Registry proposal for its model sewer use by-law, clarifying that the ministry is embarking on a different course. MOE should also solicit public input as it develops a best practices guidance document for municipalities, especially on contentious issues such as municipal transparency and accountability for discharge agreements with industry. To the extent that jurisdiction for this latter issue is led by other ministries, MOE should clarify whether inter-ministerial discussions are underway.

Among other things, the ministry should be updating the public about its progress on COA commitments related to sewage issues, and should also be sharing with the public its positions taken *vis a vis* Environment Canada's proposals to regulate municipal wastewater effluents. The outcome of the ongoing survey of landfill leachates and sewage treatment effluents should also be made available to the public. The ECO will continue to monitor the progress of MOE's policy review.

Review of Application R2002011: Aquaculture in Georgian Bay – Water Quality and Environmental Monitoring (Review Undertaken by MOE)

Background/Summary of Issues

In 2003, two applicants requested a review under the *EBR* of the Ontario government's policies and regulations related to cage aquaculture in Georgian Bay public waters, supporting their application with two substantial reports. Specific concerns about the policies and regulations for water quality and environmental monitoring of cage aquaculture were forwarded to the Ministry of the Environment (MOE) and the results of this review are discussed below.

The applicants' request for a review of the *Nutrient Management Act*, because of concerns about nutrients from fish waste, was forwarded to the Ministry of Agriculture and Food (OMAF), and their request for a review of the policies and regulations regarding escapement of farmed fish, enforcement and fines was forwarded to the Ministry of Natural Resources (MNR.) Both ministries denied the request for review. (The ECO's review of the responses from MNR and OMAF to this application can be found in the 2003/2004 annual report and Supplement.)

The applicants noted that the eastern shoreline of Georgian Bay is primarily used for recreational activities, as a source of drinking water and as a receiver of domestic sewage. Georgian Bay supports a cold water fishery and is classified as oligotrophic which means that the water has low concentrations of nitrates, phosphates and other plant nutrients. In recent years, there have been changes in water quality, a decline in the yields of walleye and bass, the appearance of zebra mussels and periodic high concentrations of *E. coli* (a bacterium that is found in fecal wastes of warm-blooded animals including humans). The applicants believe that these changes may be the result of increasing development, aquaculture and dredging in the area.

Cage aquaculture and land-based alternatives

Cage aquaculture is a method of fish farming that involves growing fish (usually rainbow trout in Ontario) in cages that are suspended in a water body such as Georgian Bay. Cages can contain as many as 30,000 fish that are fed and, if necessary medicated, and are subsequently harvested for human consumption. The feed may contain various additives such as vitamins, minerals and colorants (to dye fish flesh orange). The cages allow water to flow through them so that the oxygen levels are maintained. In addition, the cages allow fish feces, uneaten food and medication to be carried away by the current or to be deposited on the bed of the water body beneath and downstream of the cages.

Aquaculture operations may also be sited on land. This method involves growing fish in ponds, raceways or tanks. Water is piped in and wastewater is discharged after treatment to a receiving waterbody or is cleaned and recirculated back into the operation. Unlike cage aquaculture operations, land-based aquaculture operations are required to obtain a permit to take water if they plan to take more than 50,000 litres per day and a certificate of approval for sewage works from MOE. If fish waste is used as a fertilizer, then a certificate of approval for an organic waste conditioning site is also required. Land-based aquaculture operations are more expensive to build and operate since they require a water works and a sewage works instead of relying on water currents to provide clean water and take away their wastes.

Background and Legislation

Fish farming has been practiced in various parts of the world for hundreds of years. In the early 1900s, the Ontario government grew fish for the purpose of stocking lakes and streams and for rehabilitating wild fish populations. In 1962, the Ontario government amended the relevant laws to allow the private sector to grow and sell rainbow trout, brook trout, and smallmouth and largemouth bass. In 1997, the legislation was changed again to allow nearly 40 species of fish to be farmed. In 2003, there were approximately 190 private fish farms in Ontario producing an estimated 4,550 tonnes of rainbow trout and 205 tonnes of other fish species. About 80 per cent of rainbow trout production came from cage farms.

Today aquaculture operators are required to comply with numerous laws and regulations. Under subsection 47(1) of the *Fish & Wildlife Conservation Act* (*FWCA*), operators are required to obtain an aquaculture license from MNR. O. Reg. 664/98 of the *FWCA* requires operators, on request by MNR, to have measures in place to prevent fish from escaping, and to culture, buy or sell only the fish species specified on the license, which is valid for a five-year term. Operators may also require approval from the Canadian Coast Guard if the fish farm will be located in navigable waters. If the proposed fish farm will be in water located above Crown land (such as the bed of most parts of Georgian Bay) as is the case for many cage operations, the operator must also obtain a Land Use Permit under the *Public Lands Act*.

All aquaculture operators are required to comply with the water protection measures in the *Environmental Protection Act*, *Ontario Water Resources Act* and the federal *Fisheries Act*. In addition, cage operators are required to comply with the water protection measures in the conditions defined on their license.

Policies and guidelines relevant to aquaculture

In 2004, MNR approved ten policies and procedures that provide direction to MNR staff and operators on various topics including the issuance of licenses to collect, farm and stock fish, reporting of fish diseases, analysis of the risk to wild fisheries and measures to prevent escape of farmed fish. However, the policy for cage aquaculture in the Great Lakes, titled "Aquaculture on Crown Land," has not yet been developed. (For additional information about these policies and procedures, refer to pages 82-86 of the 2004/2005 annual report and pages 161-172 of the Supplement.)

MOE relies on three key documents when it considers the effects of cage operations on water and sediment quality. First, MOE uses the 1999 "Provincial Water Quality Objectives" (PWQO), which set the minimum acceptable levels for substances in surface water. The purpose of the PWQO is to protect "all forms of aquatic life and all aspects of the aquatic life cycle during indefinite exposure to the water," except in those areas influenced by MOE-approved point source discharges. According to the PWQO, levels were set without regard for its treatability, background concentrations of the substance in surface water or for the availability of measuring devices to detect PWQO levels. The minimum acceptable concentration of dissolved oxygen (DO) in a cold water fishery such as Georgian Bay ranges from 5-8 mg/L depending on the water temperature. If the background DO level is lower, substances that cause oxygen to be consumed should not be added. The interim PWQO (an interim PWQO is defined when there is insufficient toxicological information available to set a PWQO) for Total Phosphorus (TP) for lakes to provide a high level of protection against aesthetic deterioration, including lakes that have naturally lower TP levels, during the ice-free period is 10 µg/L or less. The PWQO also include a general objective which states "all waters shall be free from contaminating levels of substances and materials attributable to human activities which in themselves or in combination with other factors can: settle to form objectionable deposits; produce objectionable colour, odour, taste or turbidity; injure, are toxic to, or produce adverse physiological or behavioural responses in humans, animals or plants."

Second, MOE uses the surface water quality policies and guidelines described in the ministry's key policy document titled "Water Management" (1994). One of the relevant policies states "in areas which have water quality better than the Provincial Water Quality Objectives, water quality shall be maintained at or above the Objectives" but also states that "although some lowering of water quality is permissible in these areas, degradation below the Provincial Water Quality Objectives will not be allowed." In effect, the PWQO allow pristine water to be degraded to a lower quality. One of the relevant guidelines states "a mixing zone is defined as an area of water contiguous to a point source or definable diffuse source where the water quality does not comply with one or more of the Provincial Water Quality Objectives," and goes on to state that "conditions within a mixing zone must not result in toxic conditions or irreparable environmental damage including risk to ecosystem integrity and human health nor interfere with water supply, recreational or other water uses," and must not be used as an alternate to "reasonable and practical treatment."

Third, MOE uses its 1993 "Guidelines for the Protection and Management of Aquatic Sediment Quality in Ontario" which sets safe levels for various contaminants that may accumulate in sediment. The primary sediment quality contaminant that MOE considers for cage operations is TP. The guidelines define a TP level that can be tolerated by the majority of benthic organisms, and a level that will result in a detrimental effect to the majority of benthic species. The guidelines also state if sediment TP levels exceed the level that can be tolerated by the majority of benthic organisms or the background level, whichever is higher, then a biological assessment is required to determine how toxic the TP levels are to benthic organisms.

Based on the results of water quality studies conducted in the late 1990s at cage operations by MOE and the work of a technical working group, MOE published the report entitled "Recommendations for Operational Water Quality Monitoring at Cage Culture Aquaculture Operations, Final Draft, April 2001" that included seven recommendations. The report identified nutrient pollution (e.g., fish waste and uneaten food), oxygen depletion, degradation of the benthic (floor of the waterbody and its sediment) habitat in the vicinity of cage operations with no waste collection system and limited water exchange at sites as the main water quality issues. Bacteria, pesticides, antibiotics and alien species were also identified as water quality issues. The purpose of these recommendations was to provide interim guidance to the industry and government while additional research was done on the issues. The working group's recommendations included the following:

- Water quality data from five routinely monitored reference sites in the North Channel and Georgian Bay should be used to establish background water quality data for the area.
- Permanent water monitoring stations should be established by aquaculture operators no more than 30 metres from their cages or at the perimeter specified in their Land Use Permits, whichever is less.
- Collection of water samples at the water monitoring stations for TP testing should be done during the spring and fall when the water temperature is the same at all depths and during the summer. The samples should be tested by an accredited laboratory with the capability of detecting as little as 2 μg/L TP and the ability to accurately measure levels of 10 μg/L and above. If the median concentration of TP is found to be greater than or equal to 10 μg/L, the operator should be required to undertake an operational audit and submit an abatement plan. In the report, MOE notes that it would be preferable to use "background plus," i.e., background TP concentration plus x amount, as its trigger for an operational audit but contends that existing routine testing technology is not accurate enough at those concentrations.
- DO concentrations should be determined at least monthly and if they fall below 6 mg/L, the results should be reported to MOE and MNR immediately and the operator should change to subsistence feeding until readings improve. A benthic sampling program and other water quality testing may also be required.
- Sediment sampling should be conducted at the upstream and downstream boundaries defined in the site tenure agreement, and should be done one year prior to an existing aquaculture license being renewed or revised and should include measurement of TP.
- Monitoring requirements should be reviewed by MOE annually.

Issues raised by the applicants
The applicants identified various potential effects of cage aquaculture operations on water and sediment quality, and raised several concerns about the policies that MOE applies to these operations. Several of these concerns are discussed below.

First, cage aquaculture operations discharge fish waste directly into open water which raises phosphorus levels. Phosphorus is a "key limiting ingredient" that, when elevated, can change an ecosystem in dramatic ways "by increasing primary production" – that is, increasing plant growth including algae. Although studies indicate background concentrations of Total Phosphorus (TP) in open Georgian Bay water are 3-5 µg/L, MOE uses 10 µg/L as the level at which the ministry requires aquaculture operations to take corrective action. The applicants believe that MOE chose this level because of a "lack of more precise analytical procedures" in spite of conducting a study on open Georgian Bay water in which lower background concentrations of TP were measured.

Second, the applicants point out that the PWQO state if TP is lower than 10 µg/L, it should be maintained at that lower level. MOE ignored this policy when the ministry developed its "Recommendations for Operational Monitoring at Cage Culture Aquaculture Operations" document in 2001, the applicants believe. They argue that MOE should be using the lower level for TP in order to ensure that the ecosystem is not changed by elevated phosphorus levels, and ask that MOE "confirm that local water and sediment quality is not being impacted" by doing an "annual assessment of the benthic community."

Third, the applicants believe that MOE is using a 200-metre-diameter mixing zone for determining TP levels around aquaculture sites and that this is unacceptable. Pointing out that this is not allowed for any other user of public waters that discharge wastes that are deleterious to fish, water quality and fish habitat, the applicants requested that MOE review this policy as well.

Fourth, decomposing fish waste and uneaten food create zones of low oxygen levels that "dramatically shift the species composition in the area," the applicants note. They believe that MOE has set an inappropriate threshold level for DO of 6 mg/L. The applicants believe that if the background level of DO within or below the thermocline – the layer of water that separates the upper oxygen-rich layer of water from the lower oxygen-poor zone – is less than 12 mg/L in mid-summer or mid-winter, aquaculture should not be permitted in that area. Relying on dispersion into surrounding public waters to dilute the wastes "shifts the cost to the surrounding environment," say the applicants, who have also requested a review of the threshold limit for DO at aquaculture operations.

Fifth, the applicants believe that MOE has, to this point, not taken into consideration the possibility that bacteria from cage aquaculture operations may be contaminating the surrounding water. In support of their claim, they provided a list of "bacteria of significance as human pathogens isolated from fish or their immediate environment." The applicants ask that MOE assess the impact of bacterial contamination on adjacent waters.

As part of their application, a detailed study of water quality along the southeastern shoreline of Georgian Bay was included. Benthic macroinvertebrates, which are bottom-dwelling aquatic animals that lack a backbone such as dragonfly larvae, crayfish, mussels, snails and leeches, were sampled at 16 sites. Benthic macroinvertebrates are an important part of the ecosystem and are a food source for fish and water birds. Since benthic macroinvertebrates have a very limited ability to travel, their presence or absence in an area and relative abundance are good indicators of water quality. The study concluded that some sampling sites were showing signs of organic and nutrient enrichment but it made no attempt to identify the source of the enrichment.

Ministry Response

In its response, MOE noted that it reviewed its policies and regulations related to cage aquaculture in Georgian Bay and the following topics in particular: the standard for background TP levels, the 200 metre mixing zone for TP, sediment and benthic assessments, the trigger limits for DO at aquaculture operations and MOE's policies related to bacterial levels in waters adjacent to aquaculture operations.

As part of its review, MOE created a provincial review team that included MNR, OMAF, the federal Department of Fisheries and Oceans and Environment Canada. MOE also based its review of the data provided in the application on the water quality policies and guidelines in Water Management, PWQO, "Guidelines for the Protection and Management of Aquatic Sediment Quality" and the final draft of its "Recommendations for Operational Water Quality Monitoring at Cage Culture Aquaculture Operations" (April 2001).

Several times in its response, MOE noted that the cage aquaculture industry in Ontario is small in terms of size and scale of operations as compared to other jurisdictions. However, MOE did note that the industry has the potential to grow and that there are emerging issues related to the potential effects of cage aquaculture on the environment, such as fish manure management.

Summary of MOE's comments on the issues

Based on the water quality associated with the current cage aquaculture operations, MOE advised the applicants that the PWQO for TP and DO are being met in the Georgian Bay area. However, it also noted that "specific environmental concerns that may exist" would continue to be assessed on a case-by-case basis. MOE did not indicate what these concerns may be.

MOE also noted that it is committed to providing support to MNR on environmental matters including recommending conditions on aquaculture licenses but noted that MNR is responsible for defining conditions on licenses, and issuing and enforcing licenses. MOE explained to the applicants that it has no standards or regulations specific to aquaculture but that the *Environmental Protection Act* and the *Ontario Water Resources Act* apply to all operations. The PWQO for TP and DO in particular also apply but only if they are specified in the license issued to the aquaculture operation. MOE also noted that the guidance provided in the draft 2001 recommendations document becomes mandatory requirements if they are specified as conditions in the aquaculture license. The ministry emphasized that it considers its current policies for TP and DO to be "generally effective" based on the current scale of Georgian Bay/Lake Huron aquaculture.

With respect to the specific topics that MOE reviewed, it provided the following comments.

Standard for background TP levels

MOE advised the applicants that there is no evidence that using an interim objective of 10 µg/L for TP is "not protective of water quality" in Georgian Bay. MOE noted that the interim PWQO ranges from 10 – 20 µg/L on average for the ice-free period and 10 µg/L is used if there is a requirement to prevent nuisance algae even if the background phosphorus level is less. MOE explained that the purpose of the interim TP objective is primarily to protect the aesthetics of the water, in particular, to protect against algal blooms that can be caused by nutrients from cage aquaculture operations. It also noted that if an aquaculture operation is located in an area of limited water exchange the algal bloom may be more widespread as happened at a former aquaculture operation in La Cloche Channel. According to MOE, none of the current operations are situated in such an area.

200 metre mixing zone for TP

MOE has recommended that TP be monitored at a distance of 30 metres from the cages. This distance was selected for several reasons: the interim PWQO for phosphorus is generally met at a distance of 30 metres; monitoring can be done without interfering with cage operations; and, it will provide a reliable measure of the effect of multiple cages on phosphorus levels. MOE explained that its policy on mixing zones relates to point sources and definable non-point sources of contaminants. MOE did not comment on the applicants' statement that it had been using a 200 metre mixing zone. MOE advised the applicants that the monitoring distance should not be interpreted as a mixing zone although the principles are consistent since both the monitoring distance and mixing zone should be "as small as possible" and should not be used if "reasonable and practical treatment" options exist. MOE observed that there is no "commercially viable technology … available for the collection of fish manure from cage aquaculture."

Effect of high TP levels on benthic species
MOE explained that its "Guidelines for the Protection and Management of Aquatic Sediment Quality in Ontario" (1993) define a level of TP in sediment that is "detrimental to the majority of benthic species." Biological monitoring may be required when this level is reached since it indicates that there is a potential for biological impairment. As TP levels increase, the consumption of DO increases and DO concentrations may fall to levels that can no longer support life. MOE advised the applicants that a benthic survey would assist with understanding the biological effect of low DO concentrations if all DO concentrations fell below 6 mg/L but that a "highly intensive" benthic survey would be required to detect differences between the reference sites and cage sites. MOE further explained that benthic sampling is required before a new cage aquaculture operation is sited and that sediment monitoring is more appropriate as a screening tool than annual benthic surveys.

Trigger limits for DO at aquaculture operations
MOE explained that the PWQO for DO is based on the temperature of the water and the type of fish community to be protected. For Georgian Bay, which is a cold water fishery, the PWQO for DO is 5 to 8 mg/L. MOE concluded that the waters of Georgian Bay have been protected and that there is no evidence that fish manure and uneaten food have significantly impaired water quality for DO except in water basins with limited water exchange.

MOE's policies related to bacterial levels in waters adjacent to aquaculture operations
MOE advised the applicants that it had completed a literature search of national and international scientific journals and found no studies that linked bacterial contamination from aquaculture operations to specific human health issues. MOE also reviewed the list of bacteria that the applicants had provided as being significant human pathogens and found no scientific papers or epidemiological studies related to aquaculture operations to support this concern. MOE also disputed the applicants' contention that high bacterial levels in water in the northeast Manitoulin area may be related to an aquaculture operation on the basis that the testing methods used for the applicants' study were not appropriate for proving the source of the contamination.

Summary of MOE's commitments
In its response to the applicants, MOE indicated that it will:

- Continue to work with the aquaculture industry, stakeholders, other ministries and agencies to investigate emerging environmental issues and to improve environmental performance in general;
- Assess specific environmental concerns including potential human health concerns on a case-by-case basis;
- Ensure that the cumulative effects of future growth of the aquaculture industry are accounted for in monitoring;
- Continue to provide support to MNR on environmental issues related to aquaculture operations including conditions on aquaculture licenses and enforcement of the terms and conditions in licenses;
- Continue to ensure water quality is monitored around aquaculture operations;
- Rely on its Water Management Guidelines and the PWQO to protect water quality;
- Implement monitoring of TP at a distance of 30 metres from aquaculture cages;

- Continue to monitor the issue of TP and may re-evaluate its interim PWQO for TP after the framework for phosphorus (see below for additional information) prepared by the Canadian Council of Ministers of the Environment (CCME) is finalized in 2-3 years;
- Continue to monitor the issue of benthic community assessments and its policies;
- Discuss a more "fulsome" analysis of the effects of fish waste and uneaten feed on water quality and related sediment issues with the operators; and
- Review the bacteria and human health issue when further scientific information becomes available.

The CCME framework for phosphorus referred to in MOE's response was published in 2004 and proposes a process for determining the concentration of TP at which further assessment would be required and possibly management actions would be taken to prevent degradation of the waterbody. The process is a tiered approach in which the natural concentration of TP in the waterbody is determined; a trigger level is defined and the current concentration of TP is determined. If the current concentration of TP is greater than either the trigger level or 50 per cent over the natural level, further assessment would be required. For oligotrophic waterbodies such as Georgian Bay, CCME is proposing a trigger range from less than 4 to 10 μg/L TP.

Other Information

A study published in 1998 that analyzed the chemical composition of settleable fish waste, i.e., fish waste that settles on the bottom of the tank, from 12 land-based Ontario rainbow trout farms concluded that fresh fish waste had a similar nutrient content as other livestock manures and could be used as agricultural fertilizer.

In 2004, the Georgian Bay Association, Ontario Nature and the Ontario Federation of Anglers & Hunters called for a moratorium on new and expanding aquaculture operations and an independent government environmental review.

In 2004, the federal Commissioner for Aquaculture Development released its report "Recommendations for Change." According to this report, there will be a global shortfall of approximately 50-80 million tonnes of fish and seafood by 2030 due to the collapse of the global wild fisheries, and the aquaculture industry is expected to fill this shortfall. The Commissioner notes that Canada has the natural resource base to be one of the top three global competitors in aquaculture production. Canada currently ranks twenty-second among aquaculture producing nations. The report observes that unlike agriculture, which destroys the original ecosystem but is widely supported by Canadians, some Canadians are concerned about the environmental sustainability of fish farming. The report identified nine recommendations including:

- Regulations under s. 36 of the *Fisheries Act* be developed to authorize the deposition of deleterious substances by aquaculture operations into water according to certain conditions.
- A regulation under s. 43 of the *Fisheries Act* be enacted that would allow new or proposed aquaculture operations without consideration of whether or not they have the potential to cause a harmful alteration, disruption or destruction of fish habitat (ss. 35(2) of the *Fisheries Act*) if operations agreed to a Code of Practice that addresses fish habitat concerns.
- Funding be provided to develop tools to reduce conflict with other land uses by such methods as establishing aquaculture-suitable or aquaculture-free zones.
- Agriculture and Agri-food Canada be given responsibility for aquaculture development and the Department of Fisheries and Oceans remain accountable for the protection of wild fish stocks and fish habitats.

ECO Comment

The ECO was very pleased when MOE agreed to undertake this review. Concerns about the effects of cage aquaculture operations on water quality have been raised for years and were discussed in the ECO's 2000/2001 annual report. However, MOE's response is disappointing. It provided little new information and only vague commitments to continue to monitor the environmental effects of cage aquaculture operations and to work with the industry and others to improve environmental performance. In addition, it did not acknowledge that MOE had conducted water and sediment quality field studies in 2004, nor did it give any indication of the studies' findings or of the 1998, 1999 and 2001 studies.

MOE's response may reflect the tension that currently exists between development-oriented federal and provincial ministries such as DFO, MNR, Agriculture and Food, and Northern Development and Mines that are focused on growing the aquaculture industry, and those that are concerned about the environmental impacts of the industry on water and sediment. For the most part, the federal and provincial governments have focused their policy and regulatory efforts on mitigating the risks to wild fish if farmed fish escape from aquaculture operations. Although water quality and sediment guidelines were prepared in the form of the 2001 Recommendations, MNR is not obligated to include them as conditions on aquaculture licenses and may not have the staff or expertise to enforce them after MNR reduced its enforcement of s. 35(2) of the *Fisheries Act* in the past eight years. (See the ECO's 2001/2002 annual report for further information.) MOE's response gave no indication that any progress has been made on developing policies to mitigate water and sediment quality risks in the last few years.

Water and sediment quality policies and studies

Although the aquaculture industry has made efforts to reduce its environmental impacts through such measures as improving feed efficiency, reducing the use of medications and better siting, there is a legacy of aquaculture operations around the world that have operated without sufficient regard for the environment and occasionally have left behind severely degraded sites. One such instance occurred in La Cloche Channel in Georgian Bay. Despite these improvements, cage aquaculture operations still discharge significant amounts of waste directly into water unlike many of their land-based counterparts that are required to treat their wastes before discharging them to a waterbody. The ECO urges MOE to develop forward-thinking water and sediment quality policies and standards, monitoring and reporting rules, and best practices specific to cage aquaculture operations.

Although MOE did not provide any evidence to support its contention that PWQO are being met in Georgian Bay, it is the ECO's understanding that water and/or sediment quality studies were conducted in 1998, 1999, 2001 and 2004 in Georgian Bay related to aquaculture operations, but that MOE has not yet published the results. The ECO urges MOE to publish the results of these studies so that there is a clear understanding of the nature and extent of the issues and of the questions that remain to be answered.

Environmental effects of Total Phosphorus

In its response to the applicants, MOE described concerns about TP in water as primarily aesthetic in nature. Elevated phosphorus levels cause algal blooms that are inconvenient to the public, foul smelling and interfere with recreation. However, they can also cause significant long-term ecosystem changes such as promoting plant growth, reducing water clarity, altering the suitability of habitats to sensitive species, altering species composition, disrupting food chains and causing the death of sensitive species in an area or migration of a species to another area. These changes are not always easy to reverse. Although phosphorus is not directly toxic to organisms, algal blooms can be toxic. The ECO is very disturbed that MOE trivialized the environmental effects of elevated TP in its response to the applicants.

Interim PWQO for Total Phosphorus and general water quality objectives

The ECO disagrees with MOE's decision to use 10 µg/L as the trigger level for TP in the waters of Georgian Bay. Although the ECO is aware that TP levels much below 10 µg/L cannot be measured as reliably as at higher levels, there is no question that the background TP levels of Georgian Bay are less than 10 μg/L and may be as low as 2 μg/L in some areas according to the applicants. In effect, MOE is allowing large amounts of phosphorus to be added to Georgian Bay before abatement measures are considered. The PWQO were set based on available information at the time; do not consider the cumulative efforts of multiple contaminants on an ecosystem; require ongoing review and refinement; and are simplistic measures of water quality. Waters that are better quality than the PWQO support ecosystems that will be lost if these waters are allowed to degrade to PWQO levels.

The ECO believes that MOE should not be relying on a water quality guideline that sanctions the degradation of high quality, better than PWQO waters. Such an approach is contrary to the pollution prevention principle espoused by the ministry's SEV and the *EBR*, and to the draft CCME framework for phosphorus in freshwater. In addition, MOE did not mention that the CCME framework is recommending a TP trigger range of less than 4 to 10 ug/L for ultra-oligotrophic and oligotrophic lakes and that water quality must not be allowed to degrade to the trigger level. The ECO believes that MOE should have made a firm commitment to implement trigger levels for TP that better reflect the natural level of the waterbody and should follow the direction proposed in the CCME framework and the PWQO of not allowing high quality water to degrade to the trigger level.

Sediment and benthic monitoring
While the flow of water through cage aquaculture operations will disperse some of the fish waste and uneaten food into the waterbody, significant amounts can also accumulate under and around the site affecting sensitive benthic organisms and becoming a source of phosphorus that can re-enter the water long after the site ceases operation. Although the PWQO include a general objective that requires waters to be free of contaminating levels of substances that can settle to form objectionable deposits or which can produce adverse physiological or behavioural responses in animals, MOE appears to have ignored this objective.

In its response, MOE explained that benthic monitoring is currently required before a cage aquaculture operation is sited or if certain trigger levels are met, but that benthic monitoring results are highly variable, difficult to assess and should only be done if sediment quality monitoring suggests that there is a problem. The ECO contends that, if fish feces and uneaten food are allowed to accumulate under aquaculture operations, the general objective is violated and benthic organisms will be affected. Furthermore, the ECO is concerned that if sediment monitoring is only done every five years, early signs of degradation will not be detected. For these reasons, the ECO believes that more frequent sediment quality monitoring is required and further consideration should be given to doing more pro-active benthic monitoring. In addition, abatement measures should be clearly defined and enforced if trigger levels are exceeded.

Mixing Zones
In its response, MOE explained that a mixing zone relates to a point source or a definable diffuse (i.e., non-point) source but it did not say if it considers a cage to be one of either of these types of sources or another type. The ECO believes that MOE should clarify its position regarding the nature of cage aquaculture operations – are they point sources, definable diffuse sources or non-point sources of pollutants?

Summary comments
Overall, the ECO is disappointed in MOE's response to the applicants and urges it to take a more pro-active approach to defining water and sediment quality policies for cage aquaculture operations. Continuing to address water and sediment quality concerns on a case-by-case basis rather than developing clear policies does not address the concerns of the public and leaves the aquaculture industry without clear direction. Currently MOE can only investigate water quality concerns around cage operations if

there is a suspected violation of the *OWRA*. Since violations of conditions on aquaculture licenses may not result in a violation of the *OWRA,* the ECO urges MOE and MNR to work together to ensure that water and sediment quality conditions are added to aquaculture licenses and are enforced, and that water and sediment quality are not deteriorated.

Review of Application R2003004: Review of the Need to Prescribe the Ministry of Transportation under Part IV (Applications for Review) of the *EBR*

(Review Undertaken by MOE)

Background/Summary of Issues
In July 2003, the ECO received an application requesting that the Ministry of Transportation be prescribed for reviews under the *EBR*. This would require a regulation amending O. Reg. 73/94 under the *Environmental Bill of Rights* (*EBR*) – the general regulation under the *EBR* which specifies the ministries of the Ontario Government which are subject to all or parts of the *EBR*. At present, the regulation prescribes the Ministry of Transportation only for purposes such as *posting proposals for new* environmentally significant Acts and policies. The regulation precludes the public from *requesting a review* of the Ministry of Transportation's (MTO) policies and prescribed Acts, regulations, and instruments (permits, licences etc.). Nor can the public ask the Minister of Transportation to *review the need for new* Acts, regulations and policies. The applicants believe that the *EBR*'s application for review procedure should apply to MTO and its activities due to the environmental impacts of highway development and use, and the need for MTO to consider and/or promote modes of travel other than highway-based vehicular travel, including alternatives such as rail.

Ministry Response
The ECO forwarded this application to the Ministry of the Environment (the ministry responsible for O. Reg. 73/94) in July 2003. MOE subsequently advised the applicants and the ECO that a notice of decision as to whether a review will be conducted, along with the rationale for this decision, would arrive in a letter by September 9, 2003. In that letter, MOE confirmed that the ministry would conduct the requested review and that it expected to take six months. Between September 2003 and April 2005 MOE wrote to the applicants and the ECO on five separate occasions to extend the timeline to carry out this review. The most current advisory of April 12, 2005, indicated that the applicants could expect the review to be completed by June 30, 2005. In response to the ECO's draft annual report MTO wrote in July 2005 that it is currently not subject to Section 61 of the *EBR* but committed to posting on the Registry for public input and review, environmental policies, guidelines and standards which the ministry is updating through its Environmental Standards Project.

ECO Comment
The ECO notes that this matter is still very much alive for the applicants – since filing the application in July 2003, one of the applicants has made numerous submissions about transportation issues to the ECO and MOE. One factor that may have led to delays in completing this review, was that MOE received another application (see R2004010, page 258-259 of this Supplement) in November 2004, requesting essentially the same thing, i.e., that MTO be prescribed under the *EBR* for the purposes of making applications for review of their policies and for new policies.

The ECO believes that the fact that two independent applications for review have arrived on essentially the same topic indicates that there is substantial public concern about the willingness of MTO to open its policies and operations to public scrutiny. The ECO is also aware that MOE has met with MTO to discuss the issue since the first application was received. The ECO will review MOE's handling of this application when the ministry completes it.

Review of Application R2003015: Wood Wastes as Designated Wastes under the *Waste Diversion Act* (Review Denied by MOE)

Background/Summary of Issues

The applicants requested that MOE consider making waste wood a "designated waste" under the *Waste Diversion Act* (*WDA*). They indicate that, as a designated waste, wood waste would fall under the mandate of Waste Diversion Ontario (WDO) and, subsequently, resources would become available for the development and implementation of a wood waste diversion program. Further, the applicants argue that the provincial government is working to prevent organic wastes from being landfilled, and waste wood is organic. They refer to an announcement made on December 22, 2003, by Environment Minister Leona Dombrowsky, who indicated that the MOE planned to phase in a ban on organic wastes in Ontario landfills in a plan to "drastically reduce landfill use." The applicants also note that, currently, most wood waste in Ontario is picked up by disposal companies and landfilled out-of-province. Further, they suggest that wood waste can be used to manufacture dust-free animal bedding or composite wood.

Ministry Response

This application was received by the ECO on March 1, 2004 and forwarded to MOE. The *WDA* is not prescribed for reviews under the *Environmental Bill of Rights (EBR)* therefore MOE was under no obligation through the *EBR* to acknowledge, undertake or advise of the outcome of this request for review. Regardless of this, MOE provided a formal response to the applicants on June 10, 2004, indicating that a review is not warranted at the present time.

In its response, MOE indicated that the WDO is currently developing diversion programs for used oil and used tires. Additional wastes are being considered for designation but no timelines have been set. MOE added that, while wood waste is on the list of wastes being considered for designation, it is unable to identify a definite designation date because the minister has requested a review of "the legislative and regulatory requirements to identify and address any impediments to the re-use of wood residuals". Further, the minister would like to identify how the regulations could be modified to facilitate effective environmental management of wood wastes.

ECO Comment

The ECO commends MOE for considering this application even though it was not required to do so under the *EBR*. Further, the ECO believes MOE's response to this request was reasonable.

The ECO is pleased that MOE is taking action regarding the designation of wood waste and looks forward to seeing the outcome of the proposed legislative and regulatory reviews.

Review of Application R2003016: Waste Asphalt Roofing Shingles and Waste Industrial Roofing as Designated Wastes under the *Waste Diversion Act* (Review Denied by MOE)

Background/Summary of Issues

The applicants requested that MOE consider making waste asphalt roofing shingles and waste industrial roofing "designated wastes" under the *Waste Diversion Act* (*WDA*). They explain that, as designated wastes, these materials would fall under the mandate of Waste Diversion Ontario (WDO) and, subsequently, resources would become available for the development and implementation of diversion programs for these wastes. They raise concerns about the current practice of landfilling these wastes in Ontario and U.S. landfills because shingles do not decompose and they have a tendency to cause pools of water to form. Further, the applicants suggest that waste shingles can be re-used in a variety of ways, including as a compliment to hot mix asphalt paving.

Ministry Response
This application was received by the ECO on March 1, 2004 and forwarded to the MOE. The *WDA* is not prescribed for reviews under the *Environmental Bill of Rights* (*EBR*) therefore MOE was under no formal obligation through the *EBR* to acknowledge, undertake or advise of the outcome of this request for review. Regardless of this, MOE provided a formal response to the applicants on June 10, 2004 indicating that a review is not warranted at the present time.

In its response, MOE indicated that WDO is currently developing diversion programs for used oil and used tires. Additional wastes are being considered for designation but no timelines have been set. MOE added that, while wood waste is on the list of wastes being considered for designation, a definite designation date cannot be determined.

ECO Comment
The ECO commends MOE for considering this application even though it was not required to do so under the *EBR*. Further, the ECO believes MOE's response to this request was reasonable.

The ECO is pleased that MOE is considering designating these wastes in the future. However, it would be helpful if MOE gave these wastes the same attention that it has committed to give to wood waste. In the case of wood waste, MOE has indicated it will review legislative and regulatory requirements in order to identify and address any impediments to re-use (see the application review above, on page 242 of this Supplement).

Review of Application R2004002: Prescribing the Ministry of Education under the *EBR*
(Review Undertaken by MOE)

Background/Summary of Issues
This May 2004 application requested that the Ministry of the Environment (MOE) review O. Reg. 73/94, the General Regulation under the *EBR*, to determine whether the Ministry of Education should be added as a prescribed ministry under the *EBR*. When the *EBR* was first proclaimed in February 1994, the Ministry of Education (EDU) was not listed as a prescribed ministry under O. Reg. 73/94. Thus, the Ontario government of the day decided not to require the Ministry of Education to develop a Statement of Environmental Values (SEV) and post notices on the Environmental Registry inviting public comments on proposed decisions for environmentally significant Acts and policies before the minister makes decisions on these matters. The applicants believe that the exclusion of EDU from O. Reg. 73/94 has had a negative impact on ministry decision-making related to the financing and support of environmental education and outdoor education.

In late 1999, a similar request for a review of O. Reg. 73/94 to determine whether the Ministry of Education should be added as a prescribed ministry under the *EBR* was filed with the ECO and forwarded to MOE. While this request ultimately was denied by MOE, the ECO published an article about the issue of prescribing the Ministry of Education in our 2000/2001 ECO annual report (see pages 165-166).

Ministry Response
MOE accepted this review in June 2004 and said it expected to complete its review in six months. In late December 2004, MOE wrote to the applicants and explained that it required additional time to conduct its review, and that it expected to complete its review by June 15, 2005 under its revised timeline.

ECO Comment
The ECO will review MOE's handling of this application in our 2005/2006 annual report Supplement.

Review of Application R2004004: Review of the Provisional Certificate of Approval – Egremont Landfill Site (Review Denied by MOE)

Background/Summary of Issues
In September 2004, the ECO received an application for review raising concerns about a rural landfill site near the Town of Durham that has been in operation since 1971. The applicants requested a review of the amended provisional certificate of approval (C of A) issued in 2003 to the Corporation of the Township of Southgate for the use and operation of the Egremont Landfill site. The applicants requested that the subject C of A be reviewed, revised or revoked, and explained that they didn't believe the provisions of s. 68 of the *EBR*, which exempts ministries from reviewing decisions made within the last five years if they meet certain conditions, applied to their request. The applicants included extracts from correspondence, articles and reports documenting environmental risks posed by the landfill and public consultation related to the subject C of A.

According to the applicants, the C of A for the Egremont Landfill site was originally approved under the *Environmental Protection Act* (*EPA)* in 1971 without public consultation. The site was to provide landfill services to a population of 700 persons for an expected lifetime of 20 years. The original C of A did not require the owners to install a liner, or any other leachate collection and treatment system; instead, it relied on "natural attenuation" which meant that any leachate that enters the groundwater below the site would be sufficiently diluted or degraded by the time it reaches the site boundaries to pose no risk to the surrounding area. The C of A was substantially re-written according to the applicants in 2001 and re-issued, again without public consultation under the *EPA* or the *EBR*, after the municipalities of Dundalk, Egremont and Proton were amalgamated as the Township of Southgate. The landfill now serves a population of 7,000 persons and still relies on natural attenuation to treat its leachate.

The applicants included extracts from correspondence written by the township's consultants in 1993 that indicated landfill leachate, containing lead concentrations exceeding the health limit and phenols, had migrated off-site. Other correspondence indicated that MOE had advised the township in 1994 that the landfill site did not meet the ministry's Reasonable Use Policy since leachate had migrated beyond the boundaries of the site without sufficient containment or attenuation and that "continued landfilling could cause significant groundwater contamination beyond the property boundary." The applicants alleged that MOE dealt with the issue by requiring the township to enlarge the attenuation zone by enlarging the landfill site so that the contaminants remained within the property boundaries.

The applicants requested MOE to reconsider the appropriateness of relying on natural attenuation to contain contaminants at the Egremont Landfill site and suggested several options: require the township to develop and implement a leachate management system or, failing that, revoke the C of A for the site, or amend the C of A to require the site to be closed. Regardless of the option that MOE might select, the applicants requested a public debate of the issues.

Application of s. 67 of the EBR

According to the applicants, keeping the status quo at the site is "unacceptable and contrary to the public interest purposes of the *EBR* and *EPA*." They cited MOE's Statement of Environmental Values that states MOE will "protect the quality of the natural environment so as to safeguard the ecosystem and human health," and will use an ecosystem approach and the precautionary principle when making its decisions. Since continued operation of this landfill has the potential to harm the environment and public health, they asserted that MOE should undertake a review of the site's C of A under ss. 67(2)(a) of the *EBR*.

Under ss. 67(2)(c) of the *EBR*, a ministry is not required to undertake a review if the matter is otherwise subject to a periodic review. According to the applicants, there is no "formal, open or consultative process in place that periodically reviews or revises the C of A" and there is no statutory mechanism available for a formal public review of the C of A. The applicants pointed out that the C of A has no expiry date and that the site could remain open until 2070. Although a Landfill Public Liaison Committee was recently established, the applicants note that its findings and recommendations are not binding on MOE.

According to the applicants, the review should be undertaken under ss. 67(2)(g) of the *EBR* since the province has committed to implementing all of the recommendations from the Walkerton Inquiry including "strict enforcement of all regulations and provisions related to the safety of drinking water." They noted that the landfill's leachate is contaminating groundwater, the sole source of drinking water for the local residents.

Application of s. 68 of the EBR

Under s. 68(1) of the *EBR*, ministries are allowed to deny requests for review of decisions made within the last five years if those decisions were made consistent with the public notice and comment provisions of the *EBR*. According to the applicants, the original C of A and subsequent amendments, including the subject amended C of A, were made without meaningful

Excerpts from the *EBR* related to applications for review:

67. (1) The minister shall consider each application for review in a preliminary way to determine whether the public interest warrants a review in his or her ministry of matters raised in the application.

67. (2) In determining whether the public interest warrants a review, the minister may consider,

- *(a) the ministry statement of environmental values;*
- *(b) the potential for harm to the environment if the review applied for is not undertaken;*
- *(c) the fact that matters ought to be reviewed are otherwise subject to periodic review;*
- *(d) any social, economic, scientific or other evidence that the minister considers relevant;*
- *(e) any submission from a person who received a notice under section 66;*
- *(f) the resources required to conduct the review; and*
- *(g) any other matter that the minister considers relevant.*

67. (3) In addition, in determining whether the public interest warrants a review of any existing policy, Act, regulation or instrument applied for under subsection 61(1), the minister may consider,

- *(a) the extent to which members of the public had an opportunity to participate in the development of the policy, Act, regulation or instrument in respect of which a review is sought; and*
- *(b) how recently the policy, Act, regulation or instrument was made, passed or issued.*

68. (1) For the purposes of subsection 67(1), a minister shall not determine that the public interest warrants a review of a decision made during the five years preceding the date of the application for review if the decision was made in a manner that the minister considers consistent with the intent and purpose of Part II (Public Participation in Government Decision-making.)

68. (2) Subsection (1) does not apply where it appears to the minister that,

- *(a) there is social, economic, scientific or other evidence that failure to review the decision could result in significant harm to the environment; and*

the evidence was not taken into account when the decision sought to be reviewed was made.

public debate under either the *Environmental Assessment Act* (*EAA*) or the *EBR* despite an increase in capacity of the site. The applicants believe that ss. 68(1) does not apply. As an example of the lack of meaningful public debate, the applicants included a copy of a notice of a public meeting that the applicants believed glossed over changes to the landfill site. They advised that two public meetings were held only after a petition was received. However, neither session included a discussion of the changes and one of the meetings was terminated when attendees
posed questions. In their view, discussions at township meetings related to the landfill site do not constitute public consultation.

The applicants believe that s. 68(2) of the *EBR* which requires ministries to undertake requests for review if there is new "social, economic, scientific or other evidence that the decision could result in significant harm to the environment" applies to their request. In support of this statement, the applicants attached a copy of a recent review of hydrogeological findings that concluded the landfill poses risks to groundwater and public health and that the C of A was approved based on out-dated domestic well maps.

Ministry Response
MOE denied the request of the applicants. In its response, MOE noted that a major revision was made to the subject C of A in 2001, and a minor revision in 2003. When it approved these revisions, MOE determined that "upon probable grounds there may not be an off-site adverse environmental impact as the site currently meets the ministry's Reasonable Use Guidelines," and that natural attenuation is an "accepted landfill practice under the *EPA*." MOE clarified that, although no waste disposal volume (capacity) information had been included in the 1971 C of A, it agreed with the township's calculation that the 1971 capacity was 350,000 cubic metres and included this information in the 2001 C of A. It also noted that an increase in the footprint of the site in 2003 would result in "less potential harm to the environment" and, since it did not change the approved capacity for the site, it did not trigger an environmental assessment.

MOE also disputed the applicants' contention that the 2003 amendment was not subject to appropriate public consultation. Although public consultation was not required under the *EPA*, *EAA* or *EBR*, the township consulted with the public, provided information to the community and prepared a Public Consultation Report. MOE explained that the public review period for some residents was extended so that a hydrogeologist that they retained would have time to comment on ground and surface water studies performed on behalf of the township. The township has also established a Landfill Public Liaison Committee that will provide a forum for the exchange of information and public dialogue about the activities at the landfill site. MOE also explained that public notice and comment rights under the *EBR* were not invoked since the proposed amendments to the C of A related to the implementation of an undertaking that is exempt under s. 32(2) of the *EBR* by Regulation 334, R.R.O. 1990 of the *EAA*.

In response to the applicants' contentions that s. 68(2) of the *EBR* does not apply, MOE advised that the evidence provided by the applicants did not suggest, upon probable grounds, that the 2003 amendment would create a nuisance or is not in the public interest or may result in a hazard to the health and safety of any person. MOE also noted that it is not standard practice for a C of A to be issued with a periodic review period or a termination date. However, MOE explained that several conditions in the C of A do result in inspection and monitoring of surface water and groundwater, and that monitoring of a creek south of the landfill site from 1998 to 2000 found no impacts.

MOE concluded, after reviewing the evidence provided by the applicants, that it was prohibited under s. 68 of the *EBR* from undertaking this review.

ECO Comment

The ECO notes that MOE provided a detailed response to the applicants outlining why it didn't believe a review was necessary. Although MOE generally met its obligations under the *EBR* when it reviewed this application, the ECO believes that there are a number of gaps in the current legislative and policy framework related to the management of waste disposal sites and the rights of the public to participate in decisions related to these sites. This application highlights some of these gaps.

When the Egremont Landfill site was originally sited and approved, there were no statutory requirements to consult the public. In fact, municipal landfill sites weren't subject to the public consultation provisions in the *EAA* until 1980. To avoid duplication of effort, s. 32 of the *EBR*, which was enacted in 1994, exempts ministries from the public notice and comment provisions of the *EBR* if the proposals are subject to approval under the *EAA* or are exempted from the *EAA* by a regulation or a Declaration Order. The ECO has written extensively about problems associated with the s. 32 exemption, noting that numerous approvals are being granted without public consultation. The ECO is aware of ongoing changes to landfill sites such as the Egremont Landfill that never trigger the public participation provisions in the *EAA* or the *EBR* due to regulations that exempt certain changes or due to the nature of the changes. For instance, under Regulation 334, R.R.O. 1990, municipal projects that cost less than $3,500,000 do not require an environmental assessment under the *EAA*, and are not subject to *EAA* public participation provisions.

The *EBR* public notice and comment provisions also don't apply due to the s. 32 exemption for *EAA* undertakings. As a result, public consultation on proposals related to these undertakings is at the discretion of MOE and the owner/operator. (For further information about the relationship between the *EAA* and the *EBR*, refer to the ECO's 2003/2004 annual report, pages 52-59 and to the ECO's special report to the Legislative Assembly of Ontario called "Looking Forward: The Environmental Bill of Rights" which is available on the ECO website, www.eco.on.ca.)

Although the Egremont Landfill site was originally designed to serve a population of 700 for 20 years and was approved without public consultation, it now serves a population of 7,000 and is still operational 34 years later. Public consultation on amendments to its C of A is still not mandatory under existing environmental legislation. Today an application for a new landfill site serving a population of 7,000 would be subject to formal public consultation under the *EAA* or the *EPA*, and in some cases, the *EBR*. Although the establishment of a Landfill Public Liaison Committee for the Egremont site is a positive step, the ECO does not believe consultation with this Committee is equivalent to consultation with the public as required under the *EBR*.

The ECO also agrees with the applicants that discussions at township meetings are also not an equivalent form of consultation. The ECO is very concerned that Cs of A can be amended repeatedly for decades without triggering public consultation provisions if proposed amendments are below the trigger levels. The ECO believes that undertakings that grow in this manner should be subject to a minimum level of periodic public consultation. The ECO urges MOE to develop a mechanism to ensure that changes to municipal landfill sites are subject to at least a minimum level of public consultation.

The ECO frequently hears complaints from the public about alleged abuses of public participation processes. The public expects to be able to raise concerns and to be advised of how these concerns have been addressed and why. In 1994, MOE published guideline H-5 called "Public Consultation" in which it outlined how it would consult with the public on decisions related to new legislation, environmental standards, Cs of A and other matters related to the environment. However, a similar guideline doesn't exist for municipalities seeking to amend Cs of A for landfill sites that are exempt from public participation provisions of the *EAA*. The ECO urges MOE to develop clear guidelines for public consultation and to make them available for use by municipalities and the public.

The ECO has also received *EBR* applications regarding the Edwards Landfill site and the closed Cramahe Landfill site. In all three cases, applicants raised concerns that landfill leachate was migrating or would migrate offsite and contaminate surface water and groundwater. In 1998, MOE passed more stringent environmental protection requirements for the management of landfill leachate as O. Reg. 232/98 under the *EPA* at new or expanding landfill sites. However, changes can be made to landfill sites without triggering requirements in O. Reg. 232/98, as long as they don't result in an increase in their waste disposal volume and as long as only municipal waste is collected.

Since MOE revised the Cs of A for the Edwards and Egremont Landfill sites in recent years to document their original (1971) projected waste disposal volumes of 624,065 cubic metres and 350,000 cubic metres respectively, and since ongoing amendments haven't increased the waste disposal volumes of these sites, the less stringent generic requirements defined in Regulation 347, R.R.O. 1990 under the *EPA* continue to apply. This regulation requires owners/operators of landfill sites to collect and treat contaminants to prevent water pollution but doesn't include any further requirements. The ECO urges MOE to clarify and publish its criteria for determining whether or not a site must upgrade its leachate management system and what its requirements are for a leachate management system. Additional information about the Edwards Landfill site can be found on pages 66-70 and about the Cramahe Landfill site on pages 288-290of this Supplement. For additional information about the challenges of treating landfill leachate, refer to pages 127-132 of the ECO's annual report.

Review of Application R2004005:
Kitchener Street Landfill Certificate of Approval
(Review Undertaken by MOE)

Background/Summary of Issues

On September 19, 2004, the applicants requested a review of certain conditions in the certificate of approval (C of A) for the Kitchener Street Landfill in Orillia. The applicants believe that, because the municipality has been receiving large amounts of contaminated soil at the landfill site, the soil is increasing contamination levels in the landfill's leachate. Further, they argue that the increasing levels of contaminants in the landfill's leachate are particularly problematic because large quantities of leachate are migrating from the landfill into adjacent bodies of water, including nearby Lake Simcoe.

This application was accompanied by an application for investigation submitted by the same applicants. The ministry denied that application and it is reviewed on pages 298-300 in this Supplement.

Ministry Response

On November 23, 2004, the Ministry of the Environment agreed to review all of the conditions in the certificate of approval for the Kitchener Street Landfill. In its decision, the ministry points to evidence that contaminant levels are increasing in groundwater and surface water in the vicinity of the landfill site. The ministry indicated the review would be completed by April 30, 2005. The ECO was notified of the completion of this review on June 28, 2005.

ECO Comment

The ECO will report on the outcome of the MOE review in our 2005/2006 annual report.

Review of Application R2004006:
Combined Sewer Overflows and Beach Closures
(Review Denied by MOE)

Background/Summary of Issues
In October 2004, the ECO received an application for review from representatives of the Lake Ontario Waterkeeper, an environmental organization based in Toronto. The applicants were concerned that many Ontario cities (such as Kingston, Toronto, Hamilton and St. Catherines) experienced a high number of public beach closures during 2002-2004 due to bacterial pollution of the water. In an on-line newsletter, the organization stated that "closing a beach is like committing an act of theft," and that the people most affected include city dwellers, youth and those without summer cottages to escape to.

The applicants argued that beach closures are caused by bacterial contamination from a number of sources, and that combined sewer overflows are a major factor. The applicants also submitted surface water bacterial sampling results for the four municipalities, collected when there had been no precipitation for at least 48 hours. They noted that some of these "dry weather" bacterial levels were very high, and that this was evidence that combined sewer systems were discharging untreated sewage to waterways even in dry weather, in all the sampled municipalities.

Combined sewers are found in about 200 of Ontario's older urban communities. Such systems collect both municipal sewage and stormwater in a single-pipe system and transport the mixture to the local sewage treatment plant. During storms, these systems discharge overflow (a mixture of stormwater and untreated sewage) to local waterways, to avoid overwhelming the capacity of the sewage treatment plant. This is called wet weather overflow, and is an intentional (albeit environmentally problematic) design feature of combined sewers. However, dry weather overflows of untreated sewage can also occur, usually because regulating structures in the sewer system become blocked by debris, or because of direct, illegal connections.

The applicants observed beach closure rates far exceeding the acceptable rate of 5 per cent during the bathing season, stipulated by a guideline established by the Ministry of the Environment (MOE) in 1995. The guideline's full title is "Procedure F-5-5: Determination of Treatment Requirements for Municipal and Private Combined and Partially Separated Sewer Systems" (henceforth "F-5-5"). F-5-5 requires municipalities with combined sewer systems to develop pollution prevention and control plans. These plans are supposed to outline the nature, cause and extent of local pollution problems, examine options to address the problems, and recommend an implementation program including costs and schedules. F-5-5 sets out three explicit goals:

(a) eliminate the occurrence of dry weather overflows;
(b) minimize the potential for impacts on human health and aquatic life resulting from combined sewer overflows; and
(c) achieve swimmable water quality at local beaches during at least 95 per cent of the bathing season (based on quantifiable bacterial counts).

Are municipalities complying with F-5-5?
The applicants submitted evidence that the above goals remain very far from being met by the municipalities of Kingston, Toronto, Hamilton and St. Catherines. Their evidence included beach closures (as reported by the cities) and sampling results for *E. coli* (sampled by the applicants) in these cities between 2002 and 2004. According to their results:

- All of the sampled municipalities had *E. coli* levels consistent with combined sewer overflows in dry weather.
- *E. coli* concentrations in dry weather overflows were as high as 2,000 times the Provincial Water Quality Objective.
- Of the 21 city beaches monitored, 19 failed the F-5-5 "swimmable goal" in 2003 and 2004.

Among other things, the applicants noted that from 2003 to 2004, Hamilton's beach closures increased from 31 per cent to 44 per cent. St. Catherines' beach closures also increased from 2003 to 2004: from 78 per cent to 86 per cent. Toronto's beach closure rates have seen no real improvements since 1995, hovering around 30 per cent or worse in most years.

The applicants argued that F-5-5 is the best existing policy for protecting urban beaches, and that it has the potential to be very valuable, since it expects municipalities to ensure swimmable water quality across wide areas of their waterfront, and not just at restricted locations staffed by lifeguards. However, the applicants were concerned about the poor municipal implementation of F-5-5 to date, and saw little hope that its objectives will be met in the near future.

The applicants argued that voluntary objectives alone cannot achieve the goals of F-5-5. They cited Justice O'Connor's Report of the Walkerton Inquiry, which criticized MOE for continuing to rely on ineffective voluntary abatement tools:

> Mandatory orders carry greater force than do voluntary measures. If they are breached, they can result in the commencement of enforcement procedures, or… an administrative penalty. Voluntary abatement tools, on the other hand, can result in confusion. The clear message behind them is that the deficiency is not as serious as one that would merit a mandatory order.

The applicants requested a review of MOE's Procedure F-5-5, and requested that changes be implemented to make it effective, including making the policy mandatory or issuing control orders to bring municipalities into compliance. The ECO forwarded this application to MOE.

Ministry Response

In late December 2004, MOE informed the applicants that although the ministry would not be conducting the requested review under the *EBR*, their concerns were being taken seriously. Outside of the *EBR* context, the ministry agreed to examine "the adequacy of Pollution Prevention Control Plans for the cities of Toronto, Hamilton, St. Catherines and Kingston, as well as the use of voluntary versus mandatory measures for these municipalities with respect to meeting the objectives of Procedure F-5-5." MOE explained that the applicants' request could not be accepted under the *EBR* because it was for a review of the *implementation* of the policy. Under the *EBR*, reviews can only be requested regarding the amendment, repeal or revocation of an existing policy or the need for a new policy.

MOE anticipated that its examination of the issue would take approximately 12 months, and would be completed by December 31st, 2005. The ministry committed to inform the applicants of the outcome by mail, and offered a contact name for more information in the interim. In February 2005, MOE informed the ECO that the parameters of the review had yet to be determined, and that it was uncertain whether the review would culminate in a public report. Plans for the review did not include public consultation or a posting on the Environmental Registry.

ECO Comment

In the view of the ECO, the language of F-5-5 indicates quite clearly that it must be implemented by the approximately 200 Ontario municipalities with combined sewer systems:

> To meet the goals of this Procedure each municipality…will be expected to: develop a Pollution Prevention and Control Plan….meet minimum combined sewer overflow controls….and provide additional controls for beaches impaired by combined sewer overflows…

The guideline provides detail on what the Pollution Prevention and Control Plan "shall include", as well as a seven-point definition of "minimum combined sewer overflow controls." The guideline also emphatically directs the ministry to curtail the approval of additional urban development on combined sewer systems until upgrading is carried out:

> When and where significant combined sewer system deficiencies exist, the Regional Office of the Ministry *shall require* that the provision of sanitary servicing for additional development tributary to the deficient system be curtailed to prevent aggravation of the problem until the necessary upgrading, as outlined by a Pollution Prevention and Control Plan is carried out in keeping with the requirements of this procedure. Some development is allowed as upgrading proceeds, conditional upon its progress. The staged upgrading should at a minimum provide for the transmission and treatment of all flows from the additional development (emphasis added).

F-5-5 also notes that it has been ministry policy since 1985 that "new combined sewer systems will not be approved." It also asserts that "existing combined sewers may undergo rehabilitation or be replaced by new combined sewers *provided* the municipality or operating authority *has met the Ministry requirements* as set out in this document" (emphasis added).

Furthermore, F-5-5 contains an "enforcement" section, which notes that the ministry will "review applications for approval to ensure that the proponent is in compliance with the Procedure [F-5-5] prior to the issuance of a Certificate of Approval." (F-5-5 does not specify, however, what types of certificates of approval are subject to such a review.)

Some municipalities (such as Hamilton) have certainly interpreted the guideline to be mandatory and have taken partial steps towards addressing the requirements of the guideline. However, the ministry has never required compliance with F-5-5; specifically, it has never required municipalities to submit their Pollution Prevention and Control Plans, nor has MOE ever reviewed the adequacy of such a plan. As a consequence, MOE is not even in a position to estimate how many municipalities may have prepared plans, or have begun to implement them.

The ECO agrees with the applicants' assessment of F-5-5 as a potentially valuable policy. F-5-5 could promote improvements in urban surface water quality, if the ministry were to treat municipal compliance with F-5-5 as a high priority. This could be achieved by making the policy into a regulation (ideally with benchmark timelines), or by MOE implementing the existing policy through freezing municipal development on combined sewers until necessary upgrading is carried out.

There have been other recent applications under the *EBR* raising concerns about combined sewer overflows, notably an application about Ashbridges Bay in Toronto (2002/2003 annual report, p.155). In that context, the ECO criticized MOE's excessive reliance on voluntary mechanisms:

> Evidence at the Walkerton Inquiry demonstrated MOE's historic reluctance to prosecute municipalities, especially in relation to communal drinking water. The ministry has also tended to prefer a voluntary abatement approach when dealing with non-compliance by municipal sewage treatment plants.... In keeping with this pattern, MOE's dealings with the City of Toronto's Ashbridges Bay Sewage Treatment Plant and the city's long-standing combined sewer overflow issues ... have all emphasized voluntary measures rather than mandatory requirements or enforcement.

The ECO recognizes that the control of combined sewer overflows cannot be treated as a "silver bullet" for improving urban water quality. However, F-5-5 contains enough flexibility to allow municipalities to focus their efforts not only on combined sewer overflows, but also on any other sources that may be contributing to local water quality problems. Depending on the location, these other sources might include untreated stormwater, agricultural runoff, failing septic systems, and even concentrations of waterfowl.

U.S. Experience
Combined sewer overflows are a major water quality issue not only in Ontario but also in the United States. The U.S. Environmental Protection Agency (USEPA) issued a combined sewer overflow policy in 1994 that became law in December 2000. Among other things, the U.S. policy requires communities with combined sewer overflows to develop and implement long-term control plans (to be reviewed and approved at state level) that will ultimately result in compliance with *Clean Water Act* requirements. States have the authority to issue permits to control combined sewer overflows. The USEPA reported to Congress in late 2001 that 94 per cent of communities with combined sewer overflows were being required to control them, either through permits or enforceable orders. The agency also reported that "many of the CSO communities that have made the most progress to date, including several of the largest municipalities in the United States, have done so as the result of enforcement actions." Nevertheless, the agency acknowledged that immense challenges remained, since the controls had thus far achieved only an estimated 12 per cent reduction of combined sewer overflow volume and pollutant loadings since 1994.

Even though the 1994 U.S. policy had enforcement mechanisms and a deadline (1997), U.S. regulators clearly saw a need to strengthen the policy by *raising it to the status of law*. A 2002 report by the USEPA's Inspector General noted that "…prior to the passage of the 2000 *Wet Weather Water Quality Act*, some states saw the Combined Sewer Overflow Policy as a policy and not as a law or regulation. This prior viewpoint had an impact on the level of combined sewer overflow policy implementation." The Inspector General's report also found that the greatest improvements have been observed in states that have given the issue a high priority. Vermont, for example, gave combined sewer overflow projects priority ranking for State Revolving Fund loans, and ensured that most communities separated their sewers in the 1990s, thus reducing the number of municipalities with combined sewer overflow problems from 27 down to seven in just over a decade. Michigan has also given high priority to combined sewer overflows; among other things, the state requires a detailed annual public report of all discharges of untreated or partially treated sewage, running to over 400 pages. In Michigan, all responsible communities have submitted their required long-term control plans, and have received some degree of state approval.

The USEPA Inspector General's report also made several other findings that could be of relevance to the Ontario situation. It found that most municipalities were only monitoring the number, volume and duration of combined sewer overflow discharges. It emphasized the need for better baseline data on actual surface water quality, to allow municipalities to assess how well their controls on combined sewer overflows were working, and whether they were cost-effective. Given the very high costs and long timeframes of many control projects, it also saw a need for dissemination of better practices and success stories; a technology clearinghouse, in effect. Finally, it cautioned that a watershed management approach was needed in most instances, and that a narrow focus on controlling only combined sewer overflows would not achieve the hoped-for improvements to water quality.

Debate over best practices
MOE's guideline lists a wide range of control alternatives for municipalities to consider. While MOE does not prescribe or rank preferred approaches, there is certainly debate about the best tools to clean up and eliminate combined sewer overflows, and specifically the relative merits of source controls, sewer separation and end-of-pipe control measures. Source controls take a preventative approach; they aim to avoid the intense surges of urban stormwater that lead to combined sewer overflows. They include measures to promote groundwater infiltration such as reducing paving, encouraging the use of permeable pavements and grassed roadside swales, disconnecting roof downspouts in residential areas and cleaning roads and catchment basins. Many of these measures are local or site-specific land use planning

decisions; they require a long-term perspective and rely on the active participation of individual property owners throughout an urban area. Municipal engineers may be reluctant to rely on such relatively "soft measures," i.e., encouraging behavioural changes and waiting for gradual improvements in stormwater flows throughout a watershed. However, such measures have the important advantage of also improving stormwater quality.

Sewer separation is also a preventative approach, and is based on the observation that while urban stormwater may contain road salt, oils, pesticides and other contaminants, it typically contains much lower levels of *Escherichia coli* (*E. coli*) than sanitary sewage. If stormwater can be effectively separated from sanitary sewers, then its discharge to urban streams and beaches is likely to be more benign than the discharge from combined sewers, at least from the perspective of bathers' safety and acute human health issues. Sewer separation is typically a long-term commitment for a municipality, but costs can be reduced by integrating this work with annual, on-going sewer and road rehabilitation programs. A sewer separation program usually begins with sewers furthest downstream and progresses upstream in the sewershed over time. It should be noted that in densely developed urban areas, unless best management practices are put in place, stormwater may become sufficiently contaminated just from surface runoff that it can have a negative impact on receiving waterways (see the ECO's 2003/2004 annual report, pp. 106-110). Although sewer separation is widely used in the U.S., some Ontario municipalities (such as Hamilton) have opted against it.

In contrast, end-of-pipe solutions focus on containing and treating the contents of combined sewers before they are discharged to waterways. While there are many variations, one common approach is to construct very large underground storage tanks to capture combined sewer overflows during storm events, and to retain them for a period of hours or days until the sewage treatment plant has regained the hydraulic capacity to receive and treat these excess flows. Toronto, Hamilton and many U.S. municipalities have constructed such storage tanks. Municipal engineers may favour such an approach because the reductions in loadings can be easily quantified, and because the facilities can often be constructed on municipal property, with minimal disruption to traffic or private property. However, critics argue that while these facilities can reduce combined sewer overflows, they cannot (on their own) eliminate them. Storage tanks are simply too capital-intensive to be sized to handle back-to-back storms or very large storms, and thus overflows will persist, though they will occur less frequently. On this point, the USEPA advises that "storage and treatment of combined sewer overflows is structurally intensive and costly, and should be used only after combined sewer overflow sources have been controlled and sewer use has been optimized." In the case of Toronto, some critics argue that beach water quality has not improved sufficiently to justify the very high costs of storage tanks already installed, or to justify the planned expenditure of some further $400 million on additional storage tanks over the coming years.

Next steps

The ECO is pleased that the ministry has agreed to examine the adequacy of four municipal Pollution Prevention Control Plans as well as the use of voluntary versus mandatory measures to foster the goals of F-5-5. It appears that the applicants wanted MOE to amend F-5-5, by making it mandatory, possibly through a regulation, but they did not make this request in their application. This would have allowed the ministry to conduct the review under the legal framework of the *EBR*. Nevertheless, the ministry's chosen approach should throw some light on the effectiveness of F-5-5 thus far, and may result in improved implementation of the guideline. The ministry's review will also need to consider the December 2004 reports from its Expert Committees on source protection, recommending (among many other things) an enhanced minimum level of treatment for combined sewer overflows. A useful next step might be to develop a mechanism to evaluate the adequacy of the remaining (almost 200) Pollution Prevention Control Plans that have presumably been developed by other Ontario municipalities over the past decade.

The ECO encourages the ministry to look to the U.S. experience in regulating combined sewer overflows, and to also examine the U.S. approaches to funding improvement projects as well as their mechanisms for keeping the public informed on progress. The ECO also encourages the ministry to publish the outcome of this review, and to welcome public comment on the issue. The ECO will report on the ministry's examination of this issue in an upcoming annual report.

Review of Application R2004007:
Review of Reg. 347 and *EPA* in Relation to Septic Haulage
(Review Denied by MOE)

Background/Summary of Issues

The applicants requested a review of the definitions of "transfer" and "transfer station" under Regulation 347, R.R.O. 1990 (Reg. 347), under the *Environmental Protection Act* (*EPA*), in relation to hauled sewage. Noting that "transfer" is defined in Reg. 347 as a "physical transfer of possession," the applicants questioned whether the transfer of waste between vehicles or tanks owned by the same company is considered a physical transfer of possession. The applicants also asked how a transfer station can be defined as a waste disposal site.

Ministry Response

In April 2005, MOE informed the applicants that their request did not warrant a review under the *EBR* as there was no potential for harm to the environment if such a review was not undertaken.

ECO Comment

The ECO will review the handling of this application for review in the 2005/2006 reporting period.

Review of Application R2004009:
Review of the Certificate of Approval for Sewage Works for King City
(Review Denied by MOE)

Background/Summary of Issues

In November 2004, two applicants filed an application for review of Certificate of Approval (C of A) #3107-5ZSKK3 issued by the Ministry of the Environment (MOE) to the Regional Municipality of York for the King City Regional Sewage Pumping Station. This C of A allows for the construction of a six kilometre sewage pipe from King City to the York Durham Sewer System and a pumping station. Residents and businesses of King City, who are currently on septic systems, will be connected to the sewage pipe, nicknamed the "Big Pipe," and the septic systems will be decommissioned. The Big Pipe has been sized to accommodate the planned growth of King City from a population of 5,000 to 12,000.

The applicants stated that they wanted the C of A revoked. However, if MOE decided not to revoke the C of A, the applicants requested that it be amended to include three additional conditions:

- Approval of the C of A be made conditional upon proof of compliance of the entire York Durham Sanitary Sewer (YDSS) servicing scheme with s. 33 of the *Ontario Water Resources Act* (*OWRA*) which allows a Director, MOE to designate an area for protection if it is an area that supplies water to the public. The applicants alleged that the project will diminish the public water supply.
- Approval of the C of A be made conditional upon proof that the entire YDSS servicing scheme project complies with s. 43 of the Oak Ridges Moraine Conservation Plan.
- The entire YDSS servicing scheme project complies with the draft greenbelt legislation.

In support of their request, the applicants completed two calculations, cumulative water balance and baseflow reduction in the East Humber River, which included factors that they believe weren't considered by MOE staff when the ministry granted the C of A. They contend that the results of the calculations demonstrate that the amount of groundwater in the area available for public water supply will be unduly diminished and that there will be a significant reduction in the baseflow of the East Humber River which will effectively eliminate the cold water fishery.

Legislation cited by the applicants:

Section 33 of the *Ontario Water Resources Act* states the following:
33(1) An area may be defined by a Director that includes a source of public water supply…
(c) wherein no act shall be done and no water shall be taken that may unduly diminish the amount of water available in such area as a public water supply.

Section 43 of the Oak Ridges Moraine Conservation Plan that was prepared in compliance with the *Oak Ridges Moraine Conservation Act* passed in 2001 requires the following:
43. (1) An application for major development shall be accompanied by a sewage and water system plan that demonstrates,
that the ecological integrity of hydrological features and key natural heritage features will be maintained;
that the quantity and quality of groundwater and surface water will be maintained;
that stream baseflows will be maintained;
that the project will comply with the applicable watershed plan and water budget and conservation plan; and
that the water use projected for the development will be sustainable.
(2) Water and sewer service trenches shall be planned, designed and constructed so as to keep disruption of the natural groundwater flow to a minimum.

Background

The residents and businesses of King City, north of Toronto, are serviced by private septic systems. For nearly 10 years, residents have been fighting a decision to install a sewage pipe, nicknamed the "Big Pipe," from the community to the YDSS. The YDSS connects municipal sewers in both York and Durham Regions to the Duffin Creek Water Pollution Control Plant in the City of Pickering, Ontario, through more than 100 kilometres of sewer pipe. The Big Pipe will replace the private septic systems currently used by the residents and businesses of the community with a connection to the YDSS.

In the late 1980s and early 1990s, there were concerns that the health of the residents of King City was at risk due to high bacterial levels in the East Humber River that could result in contamination of their drinking water. The region's Medical Officer of Health and others blamed malfunctioning septic systems in King City for the contamination. Therefore, in 1994, the region and township initiated a Class EA for sewage services for King City and in 1995 it recommended the Big Pipe, which included a pumping station, be built to connect King City residences and businesses to the YDSS. The Big Pipe would replace the septic systems and support future growth of the village from the current 5,000 people to 12,000 people.

Despite judicial challenges and appeals to the Ontario Municipal Board, opponents of the Big Pipe have been unsuccessful at stopping the project. They contend that a detailed analysis of the data used to blame malfunctioning septic systems for bacterial contamination actually proves that King City was not the source of the contamination. They also contend that the Big Pipe will encourage urban sprawl and harm the local ecosystem. In July 2004, MOE approved one of the Cs of A for Sewage Works required for the construction of the Big Pipe, and it is this C of A that was the subject of this application.

Cumulative Water Balance Model

The applicants noted that the water balance model prepared in 1998 as part of the environmental assessment that studied the Big Pipe option only considered the effect of precipitation and evapotranspiration on the deep aquifer from which residents obtain their drinking water. It did not consider whether or not there was a balance between the amount of water removed by wells from the deep aquifer and the amount that was ultimately returned to the deep aquifer. The applicants considered three scenarios in their calculations: the current situation with 5,000 people serviced by septic systems, the YDSS with 5,000 people, and the YDSS with 12,000 people.

In the first scenario, i.e., the current situation, the applicants considered the amount of water in the deep aquifer that is withdrawn by wells, and added by precipitation and septic systems. They concluded that significantly more water was being added to the aquifer than was being removed. In the second scenario, i.e., 5,000 people on the YDSS, the applicants considered the amount of water in the deep aquifer that is withdrawn by wells, added by precipitation, and not available to the aquifer due to infiltration into the YDSS pipes. Since a minimum volume of water in the Big Pipe is required to prevent solids from being deposited along the walls of the pipe and to facilitate maintenance and cleaning, the applicants added in the amount of water needed to achieve minimum volume in their calculation. Based on the results of this calculation, the applicants concluded that slightly more water would be added to the deep aquifer than was being removed. In other words, there would still be a slightly positive water balance for the aquifer. In the third scenario, i.e., 12,000 people on the YDSS, the applicants considered the same factors as in the second scenario and concluded that significantly more water would be removed from the deep aquifer than returned.

Baseflow reduction in the East Humber River

The applicants note that a Fish Habitat Impact Assessment study conducted for the federal Department of Fisheries and Oceans was flawed. The study predicted that the average reduction in baseflow on the East Humber River by the YDSS would be 10 per cent and that the potential change to the channel would be too minor to cause measurable effects on the cold water fishery in the river. The applicants note that the study only considered the loss of water from the septic systems on the baseflow in the river. It did not consider the amount of water that would infiltrate into the YDSS pipes, nor the increase in population, nor did it consider the amount of water added by precipitation. When the applicants included these additional factors in their calculation of baseflow, they concluded that the average reduction would be 35 per cent. They believe that this will cause greater fluctuations in water temperatures in the river and will effectively eliminate the cold water fishery.

Great Lakes issues and the Greenbelt Plan

The applicants noted that there are ongoing discussions between Ontario and eight Great Lakes states regarding the draw down and discharge of Great Lakes waters. The applicants also noted that the draft Greenbelt Plan prohibits new Great Lake-based systems, and extensions and expansions of existing Great Lake-based sewer and water systems for the purpose of serving settlement areas designated as Protected Countryside. The applicants do note that the draft Greenbelt Plan allows for modest population growth in towns and villages at the 10-year plan review period if it can be demonstrated that the assimilative and water production capacities of the local environment would not be exceeded, and if it is consistent with the watershed plan. According to the applicants, if the local water supply is being depleted then, under the draft Greenbelt Plan, King City would not be allowed to access water from the Great Lakes and the anticipated development could not be built and the financing of the YDSS project would be in jeopardy. (The *Greenbelt Act* was passed by the Legislature in late February 2005, after this application for review was filed. For additional information about the *Greenbelt Act*, refer to pages 117-135 in this Supplement to the annual report.)

Ministry Response

In its response, MOE advised the applicants that it was denying their application on the basis that the decision to approve the C of A had been made within the last five years and was made in a manner that was consistent with public participation rights defined in the *EBR*. MOE noted that the decision was a step towards implementing a project approved under the *Environmental Assessment Act* and therefore did not need to be posted on the Environmental Registry. Despite this exemption, MOE did post the proposal as an information notice (Registry Number: XA04E0005) and did take into consideration comments that it had received before it issued the C of A.

MOE also noted that there is no social, economic, scientific or other evidence suggesting that significant harm to the environment would occur and that there was no new evidence to warrant a review of the decision to issue the C of A. In addition, MOE explained that there is no contravention of s. 33 of the *OWRA* since MOE has not designated the area for the protection of a public water system. MOE also explained that it does not consider sustainability of drinking water supplies when it reviews an application for a C of A for Sewage Works. This analysis is done when it receives an application for a permit to take water. Regardless, MOE noted that it does not include sewage effluent as a source of water to an aquifer when it examines the sustainability of water supplies. MOE noted that King City has initiated a Class EA to examine options for a new water source in anticipation of future growth and that there will be opportunities for the applicants to review this Class EA.

MOE also advised the applicants that the effect of the Big Pipe on the baseflow contribution to the East Humber River was considered during the Fisheries Impact Assessment prepared for the federal Department of Fisheries and Oceans. MOE also stated that reports released after the decision was made to issue the C of A were reviewed by MOE and did not include new evidence that would warrant consideration.

ECO Comment

Under ss. 68(1) of the *EBR*, ministries can deny applications for review if they relate to decisions that have been made within the last five years and if the decisions were made in a manner that is consistent with the intent and purpose of the public participation rights defined in the *EBR*. Since the C of A was issued only five months earlier and was issued in accordance with the public participation rights defined in the *EBR*, the ECO agrees with MOE that these tests for denying the application were met.

However, ss. 68(2) of the *EBR* does require a ministry to conduct an application for review of a decision made within the last five years if there is evidence of a risk of significant harm to the environment if the review is not undertaken. In this instance, MOE disagreed with the applicants that a decision to issue a C of A for Sewage Works should include consideration of its risk to the sustainability of a community's drinking water supply. MOE noted that a Class EA has been initiated to address future drinking water requirements of the community and that sustainability of the water supply will be considered when it considers the permit to take water (PTTW). MOE has taken the position that issuance of Cs of A for Sewage Works and PTTWs are unrelated processes. However, in 2004, the Environmental Review Tribunal (ERT) disagreed. The ERT ruled that MOE's decision to issue a C of A for quarry dewatering was unreasonable and premature since a valid PTTW wasn't in place and granted the leave to appeal. MOE has since filed a notice of an application for a judicial review of the ERT's decision contending that the ERT exceeded its authority when it made the ruling that MOE should not have issued the C of A without considering whether or not a PTTW would be issued. For additional information about the ERT's decision, refer to page 350 of the Supplement to the 2003/2004 ECO annual report and to Registry Notice Number: IA03E0893.

Ss. 68(2) of the *EBR* also requires a ministry to conduct an application for review of a decision made within the last five years if there is new evidence that wasn't considered when the decision was made. MOE did not accept the cumulative water balance budget as new information since it relates to the sustainability of the drinking water supply and not to the C of A. It also rejected the baseflow calculation provided by the applicants as new information since the issue had already been answered in the Fisheries Impact Assessment which was conducted as a result of concerns from the Ministry of Natural Resources and the federal Department of Fisheries and Oceans about baseflow. Although MOE acknowledged that new reports had been released since it made its decision, it did not identify or describe why these reports were not new information. It would have been helpful if MOE had identified these reports and provided additional detail about their contents. The ECO however does agree with MOE that, since the area has not been designated under the *OWRA* as a source of municipal drinking water, MOE is not obligated to comply with s. 33 of the *OWRA*. The ECO is unaware of any areas having been designated as sources of public water supply under s. 33 of the *OWRA*.

Although MOE's response to the applicants did analyze the application according to s.68 of the *EBR*, MOE failed to include any response to the applicant's request that the C of A should include a condition related to compliance with the *Greenbelt Act* and the Greenbelt Plan. The ECO also notes that MOE did not notify the applicants that it would be late with its response as required by the *EBR*. Since the matter of whether or not MOE should consider the availability of drinking water when it issues a C of A for Sewage Works is currently being challenged in the courts, it is inappropriate for the ECO to comment on this aspect of the application at this time.

Review of Application R2004010:
Review of the Need to Prescribe the Ministry of Transportation under Part IV (Applications for Review) of the *EBR*
(Review Undertaken by MOE)

Background/Summary of Issues

In November 2004, the ECO received an application requesting that the Ministry of Transportation be prescribed for reviews under the *EBR*. This would require a regulation to amend O. Reg. 73/94 under the *Environmental Bill of Rights* (*EBR*) – the general regulation under the *EBR* which specifies the ministries of the Ontario government which are subject to all or parts of the *EBR*. At present, the regulation prescribes the Ministry of Transportation only for purposes such as *posting proposals for new* environmentally significant Acts and policies. The regulation precludes the public from *requesting a review* of the Ministry of Transportation's (MTO) policies and prescribed Acts, regulations, and instruments (permits, licences etc.). Nor can the public ask the Minister of Transportation to *review the need for new* Acts, regulations and policies. The applicants believe that MTO should be subject to the *EBR*'s application for review procedure because transportation projects collectively have a substantial impact on environmental quality. According to the applicants, MTO projects can impact the local environment by reducing the size and/or quality of natural habitats and by increasing the number of vehicles that use highways, thereby increasing air emissions which affect human health.

Ministry Response

The ECO forwarded this application to the Ministry of the Environment (the ministry responsible for O. Reg. 73/94) who subsequently advised the applicants and the ECO that a notice of decision as to whether a review will be conducted, along with the rationale for this decision would arrive in a letter by January 9, 2005. In that letter (dated January 17, 2005), MOE indicated that ministry staff were already reviewing the need to prescribe MTO for the purposes of applications for review. As a result MOE said it would combine this application (R2004010) with the review already underway. MOE indicated that the combined review should be completed by April 15, 2005, and that the applicants would receive the results of their review by May 15, 2005. However, the ECO is aware that MOE failed to notify the applicants, in April 2005, that this combined review was delayed and would not be completed until June 30, 2005. In response to the ECO's draft annual report MTO wrote in July 2005 that it is currently not subject to Section 61 of the EBR but committed to posting on the Registry for public input and review, environmental policies, guidelines and standards which the ministry is updating through its Environmental Standards Project.

ECO Comment

The ECO will continue to monitor MOE's handling of this application and the related application (see R2003004, page 241 of this Supplement) that MOE has combined it with (MOE thus created an amalgamated review). The ECO will report on these applications in next year's annual report.

Review of Application R2004012:
Review of Provisional C of A Issued to Sheldrick Sanitation Ltd.
(Review accepted by MOE)

Background/Summary of Issues

The applicants requested that MOE review the certificate of approval (C of A) for the use and operation of a waste disposal site (transfer and processing station) in Smithville by Sheldrick Sanitation Limited. Sheldrick currently operates under a Provisional C of A No. A650112 issued in 1996 (and amended October 25, 1999) which permits the facility to receive, process, temporarily store and transfer 300 tonnes of municipal and non-hazardous solid industrial waste per day.

This November 2004 application for review was accompanied by a separate application for investigation by the same applicants. The ministry denied the investigation in February 2005. The ECO has reviewed MOE's handling of this application on pages 302-307 of this annual report Supplement.

Ministry Response

The ministry accepted this review in early 2005. However, the scope of the review is restricted to two conditions in the C of A related to the Odour Control Plan for the site.

ECO Comment

The ECO will review MOE's handling of this application in a future annual report after MOE has completed its review.

MINISTRY OF MUNICIPAL AFFAIRS AND HOUSING

Review of Applications R2004008 and R2004011: Review of Prescription of the *Oak Ridges Moraine Conservation Act* under the *EBR*
(Review Denied by MAH)

Background/Summary of Issues

In October 2004, two applicants requested that the *Oak Ridges Moraine Conservation Act* (*ORMCA*) and the Oak Ridges Moraine Conservation Plan (ORMCP) be prescribed for applications for investigation under the *Environmental Bill of Rights*. The applicants noted that in September 2003, the Ministry of Municipal Affairs and Housing (MAH) proposed an amendment to O. Reg. 73/94 under the *EBR* to prescribe the *ORMCA* for the purposes of notice and comment, for applications for review and for protection of whistleblowers from employer reprisals. As of March 2005, no decision has been made about this proposal. The applicants supported this proposal but they asked that the *ORMCA* also be prescribed for applications for investigation since the *ORMCA* makes it an offence to contravene a prohibition in the ORMCP or fail to comply with a restriction in the ORMCP or an order issued under the Act.

The *ORMCA*, which was passed in December 2001, provides a framework for "protecting the ecological and hydrological features and functions" of the Oak Ridges Moraine (ORM) – a 160-kilometre ridge that runs parallel to Lake Ontario from the Trent River to the Niagara Escarpment. The ORM divides watersheds into those that drain south into Lake Ontario, and those that drain north into Georgian Bay, Lake Simcoe and the Trent River. The ORM is a significant greenspace in the southern Ontario landscape and is a rich source of aggregates. Protection of the ORM is also considered to be critical for safeguarding drinking water supplies for many communities. However, continued population growth has put pressure on the provincial government and municipalities to allow residential and industrial development on the ORM and to bisect the ORM with transportation and utility corridors.

Under the authority of the *ORMCA*, the Oak Ridges Moraine Conservation Plan (ORMCP) was developed and approved as a regulation in 2002. The ORMCP has nine objectives as defined by the *ORMCA* including the following:

- protecting the ecological and hydrological integrity of the ORM area.
- ensuring that only land and resource uses that maintain, improve or restore the ecological and hydrological functions of the ORM area are permitted.
- ensuring that the ORM area is maintained as a continuous natural landform.
- providing for continued development within existing urban settlement areas and recognizing existing rural settlements.

The ORMCP divides the ORM area into four land use designations: Natural Core Areas, Natural Linkage Areas, Countryside Areas and Settlement Areas. The ORMCP then defines the planning objectives and permitted uses such as transportation and utility corridors, aggregate extraction, agriculture, and residential and industrial development for each designation. Any use of the land or structures on the land that is not one of the permitted uses is prohibited by the ORMCP. The ORMCP also requires municipalities to prepare watershed plans, water budgets and water conservation plans, and to limit development in wellhead protection areas.

Municipalities in the ORM area were required to bring their Official Plans into conformity with the ORMCP but they were also allowed to adopt policies and zoning by-laws that were more restrictive than the ORMCP unless it was prohibited by the ORMCP. Amendments to Official Plans and zoning by-laws were submitted to MAH for approval and could be appealed to the Ontario Municipal Board (OMB). The

ORMCA also requires provincial ministries and agencies to make decisions under the *Planning Act* and the *Condominium Act* that conform with the ORMCP. (For additional information on the *ORMCA* and ORMCP, refer to pages 72-79 in the 2001/2002 ECO annual report or pages 123-133 in the Supplement to the 2001/2002 ECO annual report.)

In support of their request, the applicants observed that the objectives of the *EBR* and the ORMCP are "virtually the same" including the protection of the integrity and sustainability of the environment and the provision of a healthful environment. Therefore, they noted that Ontario residents should be allowed to request an investigation into alleged contraventions of the *ORMCA* and the ORMCP. The applicants also noted that alleged contraventions of the *ORMCA* or ORMCP could include contraventions related to water taking, source water protection, Great Lakes water quality and quantity, and watershed management, which are already subject to applications for investigation under the *Ontario Water Resources Act*.

Ministry Response

Since the applicants requested an amendment to O. Reg. 73/94 under the *EBR*, the ECO forwarded the application to the Ministry of the Environment (MOE). MOE is responsible for *EBR* regulations and undertook a preliminary review of the application. MOE decided that it would be more appropriate for MAH to undertake the review since it is responsible for determining which parts of the *ORMCA* should be prescribed under the *EBR* and since it would be responsible for conducting investigations if the *ORMCA* or ORMCP became subject to applications for investigation.

In February 2005, MAH advised the applicants that, according to s. 68 of the *EBR* if the decision was made within the last five years and was made consistent with the public participation rights defined in the *EBR*, the minister could deny the application. MAH noted that the *ORMCA* and ORMCP had been subject to extensive public consultation and had been decided within the last five years.

MAH also advised the applicants that a request for review of the proposal to prescribe the *ORMCA* under the *EBR* was not warranted on the basis that municipalities are responsible for the implementation of the *ORMCA* and ORMCP by ensuring that their Official Plans and zoning by-laws conform to the ORMCP. MAH noted that this approach is consistent with the existing land use planning system in Ontario.

ECO Comment

The ECO frequently receives calls from Ontario residents frustrated that alleged contraventions of planning legislation and policies, Official Plans and zoning by-laws are being ignored by municipalities and the provincial government. Planning processes do include a mechanism for residents to appeal recent planning decisions to the Ontario Municipal Board. In addition, there are procedures in place related to municipal by-law enforcement, if applicable, and if the municipality has sufficient resources available. However, there is no formal provincial process for reporting alleged contraventions of planning decisions to MAH and for investigating the allegations. Often the only option left to residents is the court system, a process which is lengthy and expensive. In contrast, requests to investigate alleged contraventions of several important environmental acts, including the *Environmental Protection Act* and the *Ontario Water Resources Act*, administered by MOE, can be made by filing an application with the ECO. The relevant ministry is then required to consider the request and (based on trends over the past 10 years) about 30 per cent of the time the alleged contravention is investigated. Regardless of the outcome of these requests, residents still have the option of going to court. The applicants were asking that this same process be made available for alleged contraventions of the *ORMCA* and ORMCP. If the applicants' requests were granted, members of the public would be able to request that MAH investigate alleged contraventions of the *ORMCA* and ORMCP.

In its response to the applicants, MAH noted that municipalities are responsible for the implementation of the *ORMCA* and ORMCP but it failed to note that MAH is responsible for ensuring that the amendments to Official Plans and zoning by-laws conform to the *ORMCA* and ORMCP. Contraventions of the *ORMCA* and ORMCP could arise if:

- MAH failed to identify the non-conformity when it approved the amendments to the Official Plan or the zoning by-laws.
- The municipality made planning decisions that conflicted with its MAH-approved Official Plan or zoning by-laws.
- Implementers of planning decisions, such as developers, municipalities, residents and others, failed to comply with the planning decisions.

Although MAH stated that it denied the request for review since municipalities are responsible for implementing the *ORMCA* and ORMCP, the actual reason that MAH was within its rights to deny the request was because no decision has yet been made on its proposal to prescribe the *ORMCA* under the *EBR*. The ECO encourages MAH to consider the applicants' request when it finalizes its plans to prescribe the *ORMCA* under the *EBR*. In its handling of the application, MAH was several weeks late in providing its response to the applicants. In addition, its response could have included a description of the current options available (such as private prosecutions or other potential legal actions) if members of the public suspect a contravention of the *ORMCA* or the ORMCP has occurred.

Review of Application R2003017: *Planning Act* and Mineral Aggregate Extraction (Review Denied by MAH)

Background/Summary of Issues

The applicants requested in an application filed in March 2004 that an amendment be proposed to the *Planning Act* (*PA*) that would eliminate the right to appeal mineral aggregate extraction applications under the *PA* that are not supported by a municipal council. This would have extended a proposal made by the government in Bill 26, the *Strong Communities (Planning Amendment) Act, 2004*, to amend s. 22 of the *PA* to eliminate appeals to the Ontario Municipal Board (OMB) for proponent-led Official Plan and zoning by-law amendments for urban settlement area boundary alterations or new settlement areas not supported by a municipal council. The Ontario government subsequently enacted Bill 26 in November 2004, and a revised Provincial Policy Statement (PPS) came into effect in March 2005.

The applicants noted that, while aggregate is an important resource, there is an abundant supply and new sites are not needed everywhere. They alleged that pits in Carden in the City of Kawartha Lakes presently ship less than 18 per cent of their capacity due to a lack of demand. However, according to the applicants, developers buy farmland to convert to aggregate extraction and appeal rezoning requests to the OMB with almost certain success.

The applicants submitted that municipalities should allow aggregate extraction in an orderly manner that minimizes environmental destruction, by consolidating pits tightly near good highways rather than spreading them randomly through a region. The applicants stated that municipalities need the authority to control the location and expansion of pits within the guidelines of provincial policy.

Ministry Response

In May 2004, MAH informed the applicants that their application did not warrant a separate review under the *EBR*, but some of the issues they raised would be considered as part of the Bill 26 and planning reform public consultation and review process.

In its response, MAH noted that the government planned to carry out public consultations on Bill 26, proposed revisions to the Provincial Policy Statement and broader planning reforms, including the need for further reform of the *PA*. MAH explained that the ministry had decided that this application for amendment of the *PA* regarding mineral aggregate resource applications would be considered as part of these consultation processes.

MAH formally announced this consultation exercise two weeks later, on June 1, 2004. Although MAH alerted the applicants to the upcoming public consultation, it could not provide specific information until it was announced.

MAH posted a policy proposal on the land use planning reforms on June 3, 2004, and provided a comment period of 89 days.

ECO Comment

MAH's response to this very brief application for review was adequate, given the public consultation on land use planning reform in general, and the *PA* in particular.

The ECO's 2002/2003 annual report described some of the environmental impacts of aggregate extraction, and stressed the need for a provincial aggregate conversation strategy (see p. 29 of the ECO's 2002/2003 annual report). The ECO will examine broader policy issues arising out of this application, such as managing demand for aggregate, in application reviews slated for our 2005/2006 report.

Review of Application R2003013: Review of the Provincial Policy Statement (Review Denied by MAH)

Background/Summary of Issues

In February 2004, the applicants submitted an application for review of s. 2.2.3.1 of the Provincial Policy Statement (PPS) under the *Planning Act*. The PPS provides policy direction on matters of provincial interest related to land use planning and development. This section states: "As much of the mineral aggregate resources as is realistically possible will be made available to supply mineral resource needs, as close to markets as possible." The application was submitted to both the Ministry of Municipal Affairs and Housing (MAH) and the Ministry of Natural Resources (MNR).

The applicants were concerned that the current wording of this section of the PPS was vague and open to interpretation. They asserted that this wording risked the adequacy of planning for natural heritage areas, citing the specific example of the Carden Plain. The applicants suggested that the wording of this section of the PPS be changed to: "A 15 year supply of mineral aggregate resource will be secured. It will be composed of all licensed quarries plus resource reserve divided [by] the average annual shipments over the past five years."

Ministry Response

In April 2004, MAH denied this application for review. The ministry stated that the PPS, including the sections addressing aggregate resources, was already under review as required every five years by the *Planning Act*. The ministry stated that conducting a separate review based on this application would result in a duplication of the existing review. MAH explained the public consultation process with regard to the ministry's ongoing review, assuring the applicants that their concerns would be considered as part of that process.

MAH met the technical requirements of the *Environmental Bill of Rights* in handing this review.

The decision letter was signed by the Assistant Deputy Minister (Acting), Ministry of Municipal Affairs and Housing.

ECO Comment

The ECO concurs with MAH's decision to deny this application based on the fact that the PPS was already being reviewed at the time by the ministry. However, the ECO has expressed similar concerns as the applicants with regard to aggregates in previous annual reports. The ECO believes that the inherent conflicts between the long-term demands for aggregates and the final dispensation of the landscape for other uses, such as natural heritage protection, must be resolved.

In the 2002/2003 annual report, the ECO noted that one source of conflict is that the PPS outlines policies that appear to be contradictory. On the one hand, the PPS uses clear language to emphasize the importance of aggregate resources and aggregate operations: "As much of the mineral aggregate resources as is realistically possible will be made available to supply mineral resource needs, as close to markets as possible. Mineral aggregate operations will be protected from activities that would preclude or hinder their expansion or continued use or which would be incompatible for reasons of public health, public safety or environmental impact." But the PPS also clearly states that "natural heritage features and areas will be protected from incompatible development." In this same report, the ECO recommended that MNR and the Ministry of Transportation develop a strategy to conserve aggregate resources.

MINISTRY OF NATURAL RESOURCES

Review of Application 2003005:
Review of the Managed Forest Tax Incentive Program
(Review Undertaken by MNR)

Background/Summary of Issues
In fall 2003, the ECO received an application for review of the Ministry of Natural Resources' Managed Forest Tax Incentive Program (MFTIP) from persons representing private foresters in southern Ontario. MFTIP was created in 1997 to provide a financial incentive to encourage private forest stewardship. Forests which are actively managed by their landowners, and which are more than four hectares (10 acres) in size would be assessed similar to farmland and taxed at the rate of 25 per cent of the municipal tax rate for residential properties.

The application raised concerns about how properties were being assessed for taxation purposes – an issue which began to intensify for managed forest property owners between late 2002 and early 2003. The applicants argued that, at that time, the Municipal Property Assessment Corporation (MPAC), a municipally-funded, not-for-profit corporation which assesses the value of property in Ontario for taxation purposes, began changing its methods of assessing the value of managed forest properties. MPAC states it made certain changes in April 2003, at the direction of the Ministry of Finance (MOF) – the ministry which oversees the *Assessment Act,* the legislation MPAC uses to administer property tax assessment. According to the applicants, the changes to MPAC's property value assessment methodologies mean that many managed forest owners are required to pay substantial increases in property taxes, undermining the intentions of MFTIP. The applicants charged that the assessment of managed forests was redefined to be the "highest end use" (i.e., a land's potential value for residential and commercial development) instead of being valued on the same basis as farmlands. The applicants noted that when MFTIP was formulated in 1997, MNR indicated that managed forests would be taxed at the same rate and assessed identically to farmlands (i.e., based on land productivity).

The applicants noted that in southwestern Ontario, private forest lands represent in excess of 95 per cent of the total area of treed space and, therefore, take on special ecological significance. The applicants contended that if managed forest property owners' tax assessment issues are not resolved then many forested properties in southern Ontario could undergo clearing and land use transformation. And, just as harmful, property owners face a disincentive to allowing marginal farmland to revert back to forest cover if farm and forest lands are not given equivalent tax treatment. Some of the anticipated harmful environmental impacts of further deforestation could include diminished protection of ground and surface water, less carbon sequestration, and diminishment of fish and wildlife habitat. Provincial initiatives such as MNR's Southcentral Region Forest Strategy, the Oak Ridges Moraine Conservation Plan, and Smart Growth initiatives could suffer. Finally, substantial economic losses in the areas of sport fishing, maple syrup production and industrial roundwood could occur.

Ministry Response
MNR provided a thorough response to the application for review of MFTIP in the form of a 50-page report, which included: responses in question and answer format, graphs, an executive summary and data in appendixes. The following is an overview of key items from the report.

Appropriateness of Assessment Methodology Changes
MNR acknowledged that from 1998 to 2002, managed forest properties were assessed using a subset of farm land values. However, the ministry noted that this is inconsistent with the principles of Ontario's *Assessment Act*. Under this *Act*, properties must be valued based on their current value or current use value, and not on the basis of characteristics of properties in another, unrelated property class. Using

proxy values (farmland for forest lands) was inconsistent with the *Assessment Act* particularly where sales data for forest properties were available. Continuing with this approach would lead to the establishment of a precedent in property tax policy. For these reasons, MNR agreed that MPAC acted appropriately in identifying the divergence in land values between farm and managed forest properties. MNR also concurred with MPAC's use of a new model for assessing the value of managed forest properties based on the sales of managed forest properties within defined areas of the province.

Communication to Landowners
MNR acknowledged that the change in assessment methodology was not communicated by MPAC to MFTIP property owners in advance or as it was implemented. This lack of communication was particularly unfortunate as property owners often received assessment notices with significant increases without an accompanying explanation or outreach effort from MPAC. Communicating to landowners about assessment methodology was particularly important given the widespread understanding in the late 1990s that the government had committed to a principle of "assessing managed forest properties in a manner similar to (sometimes expressed as "identical to") farmland." Program materials for MFTIP included this wording, and it was commonly understood by stakeholders and property owners to reflect a commitment to use acreage rates for farms as a proxy for managed forest land values (and therefore understandable that property owners had this expectation). MNR noted that provincial staff felt that the wording was accurate. However, the *Assessment Act* specifies that current use methodology be applied to managed forest properties, similar to the methodology applied to farmlands.

MNR also added that the ministry initially felt some other factor – the apportionment method used by MPAC – was the cause of increases in tax assessments. Apportionment determines the share of a mixed use property which is taxed at the managed forest rate and what share is taxed at the residential or other rate.

Assessment and Tax Impacts
MNR reported that, the average property values for managed forest properties (in aggregate), as measured by the average value per acre, did not increase substantially as a result of MPAC's new assessment methodology – thus tax increases were minimal for many managed forest property owners. For example, the ministry indicated that, according to their analysis, values per acre of managed forest properties were similar to values per acre for Class 4 farmland in all areas of the province, with the exception of the Greater Toronto Area and south-central Ontario, where values lie slightly above Class 4 rates. Also, MNR noted that "for pure managed forest properties and the managed forest components of mixed-use properties, property taxes for the majority of property owners fall within the $50 to $250 range. Fewer than 10% of property owners will face a tax responsibility greater than $500."

Environmental Harm
MNR felt that harm would not result from MPAC's change in assessment methodology, stating in its analysis: "This review cannot conclude that the change in assessment methodology for managed forest has resulted in, or could result in, harm [to] the environment." The ministry went on to describe the growth in program participants and hectares of managed forest property between 1998 and 2004 as evidence of the program's strength. However, the ministry acknowledged that in areas such as the outskirts of Toronto where property values are significant and increasing, the reduction in property taxes provided by MFTIP may not be a significant enough incentive alone to offset financial gains from converting the land to other uses.

MNR added that other initiatives could make a contribution to the preservation of Ontario's forests, including the work of the Greenbelt Task Force, the Oak Ridges Moraine Conservation Plan, the Niagara Escarpment Plan Five-Year Review, the planning reform initiative (including the review of the Provincial Policy Statement, the *Planning Act* and Ontario Municipal Board reform), watershed-based source protection planning, the Growing Strong Rural Communities Plan, and the Growth Management consultation process.

Recommendations Arising from the Review

MNR produced the following recommendations based on its review:

1. MNR and MOF should continue to monitor participation of landowners in MFTIP to track net participation rates and review program success parameters.
2. MOF, with MNR's participation, will proceed with proposing revisions to O. Reg. 282/98 of the *Assessment Act* in order to realize MFTIP administrative efficiencies and program clarification (e.g., extend the managed forest term to 10 years from five to allow participant costs to be spread over a longer time period).
3. MPAC's existing current use valuation procedures for managed forests (which determine assessments based on a sales comparison of other managed forest properties in the area), should continue to be used as the assessment methodology for managed forest properties.
4. MOF and MNR should work together to update and clarify MFTIP materials to more clearly communicate the property assessment and property tax system as it applies to MFTIP properties.
5. MOF will work with MPAC to reinforce the need for more clarity and transparency for property owners on the valuation procedures for managed forest properties and to ensure that property owners receive more timely notification of any future revisions to property valuation procedures.
6. MOF will work with MPAC to undertake a review and validation of the existing assessment methodology used for managed forest properties by an impartial third party.
7. MOF and MNR will establish a committee, including stakeholder representatives and MPAC to respond to issues with implementation of the assessment procedures in the coming year. This committee will also oversee the implementation of recommendations in this report.
8. MNR will work with MOF to address how any potential changes to the MFTIP can support the government's initiatives for the "greening" of southern Ontario.

ECO Comment

The goal of MNR's Managed Forest Tax Incentive Program is "to maintain and enhance healthy forests that contribute to the maintenance of a healthy environment." The program has become very popular among landowners with managed forests and woodlots in Ontario. By 2004, more than 10,700 landowners were participating, helping to protect approximately 690,000 hectares of forest lands in Ontario. MNR acknowledges that the program is a powerful tool to increase landowner awareness and education about sustainable forest management practices. However, because of its administration through the Municipal Property Assessment Corporation (MPAC) under the supervision of the Ministry of Finance, the ECO questions whether MFTIP's goals of protection and education will continue to be met. In fact, MPAC's changes in assessment methodology over the 2002-2004 period are likely to be very detrimental to the managed forests of Ontario.

In its response to the applicants, MNR agreed that MPAC's assessment methodology changes were appropriate and that continuing to use a subset of farm land values for assessment of managed forest properties would be inconsistent with the principles of Ontario's *Assessment Act*. But, up until May 2003, MNR vigorously defended the pre-existing approach in correspondence to the Ministry of Finance. MNR wrote "MPAC's most recent valuation procedures (April 2003) are contrary to the government direction for MFTIP." This reversal of opinion on the part of MNR suggests that MPAC and the Ministry of Finance may be unduly influencing the administration of MFTIP and forcing MNR to abandon the core commitment of MFTIP – that managed forest properties would be assessed identical to farmland.

Furthermore, the ECO feels that MNR, MOF and MPAC should focus more attention on some of the underlying principles of the *Assessment Act* which affirm, not undermine, the goals of MFTIP. For example, forests on farm properties are considered by the Act to be of such value that certain forested lands are included under a category of tax exempt properties which includes churches, museums, cemeteries, public hospitals and other institutions greatly valued by society. Specifically, this exemption applies to land on a farm that is used for forestry purposes – one acre in 20 is eligible, up to a total of 20 acres, provided the land is under single ownership and in a single municipality. In effect, this provision recognizes the importance of maintaining woodlots on the countryside. Similarly, the *Assessment Act* specifies that managed forest lands are to be valued intrinsically (i.e., appreciated for their worth as a forest) and not for other uses to which they could be put (e.g., a cottage or estate home development):

> The current value of land that is conservation land or managed forests land as defined in the regulations shall be based only on the current use of the land and not other uses to which the land could be put.

MNR used average increases in assessments in its summary of the impact of MPAC's methodology changes in order to declare that property assessments did not increase substantially. For example, MNR notes that "for pure managed forest properties and the managed forest components of mixed-use properties, property taxes for the majority of property owners fall within the $50 to $250 range. Fewer than 10% of property owners will face a tax responsibility greater than $500." But it is also true that for about five per cent of the properties, assessments will rise by more than $1000/year and some of these by more than $10,000/year – a very substantial increase. Some of the most affected properties are also large and therefore major forest ecosystems could be put in jeopardy by the assessment increases. Furthermore, in MNR's detailed findings, it is apparent that the Managed Forest class was the hardest hit by MPAC's methodology changes:

Per cent increases in property tax assessments by class over 2003-2004

Property Class	**2003**	**2004**	**Compound Increase**
Residential	11%	13%	25%
Multi-Residential	12%	12%	24%
Commercial (broad)	12%	5%	18%
Industrial (broad)	18%	7%	26%
Farmland	18%	8%	27%
Managed Forest	**22%**	**18%**	**44%**
Average increase	12%	12%	25%

MNR did not feel it could conclude that harm to the environment would result from MPAC's change in assessment methodology for managed forests. Yet the ministry acknowledged that in areas such as the outskirts of Toronto where property values are significant and increasing, the reduction in property taxes provided by MFTIP may not be a significant enough incentive alone to offset financial gains from converting the land to other uses. Furthermore the ministry acknowledged that:

> Each landowner has their own unique set of circumstances, interests and ability to absorb increases to carrying costs for their property (i.e., property taxes). An amount that appears inconsequential to one landowner may impact another significantly. While the current incentive may continue to attract program participants, some participants may feel it necessary to sell the land, sever the land into smaller pieces, or as an interim measure practice poor forest management practice (i.e., heavy cuts).

MNR also acknowledged in its response to the applicants that afforestation of marginal farmland could be threatened. An "unintentional barrier could be created which may discourage tree planting and afforestation" on low productivity farms if there is a "divergence in taxation between farm lands and managed forests." This is precisely what is occurring according to many of the letters of landowners that the applicants included in their application for a review of MFTIP.

In its 2003/2004 annual report, the ECO recommended that MNR ensure that MFTIP provides no financial incentive to clear forested tracts of land in southern Ontario (where the majority of MFTIP participants are located). It is critical that these forested lands and woodlots be regarded as important for what they are, intrinsically, and just as important as food production, or the 'next' development project. Such forests are vital for numerous reasons, including providing biodiversity, habitat, mitigating floods and soil erosion, and buffering the effects of climate change.

MNR acknowledges that tax treatment identical to that of a neighbouring farm property was a reasonable expectation of MFTIP participants, but because of conflict with the *Assessment Act*, MNR is unable to continue to make this commitment. MNR indicated that continuing to assess forest properties by farmland proxy would violate the principles of the *Assessment Act*. But, to resolve this issue adequately, MNR needs to ensure that the forest land assessments match farm land assessments, not those of cottage and residential properties. The changes brought to MFTIP over 2002-2004 significantly changed the initial conditions by which private foresters agreed to participate. Managed forest property owners made investments in land and silviculture based on the original design of the program – redefining how the program is applied, several years into it, is unfair to the private foresters. These changes have become significant enough that some private forest managers have discussed litigation to resolve the matter. In the balance is the long-term silvicultural health of thousands of hectares of forest, mostly in southern Ontario where private forested lands make up a significant portion of all forests in this area.

MNR did not agree to undertake a review of how managed forests are assessed in its response to this application for review. MNR offered only program administrative changes: "MOF, with MNR's participation, will proceed with proposing revisions to O. Reg. 282/98 of the *Assessment Act* in order to realize MFTIP administrative efficiencies and program clarification." (MNR did not provide the details of the proposed amendments in its response, other than to give an example of a proposed amendment.) In any case, program efficiencies and clarification alone would likely be insufficient to address the concerns of managed forest property owners. However, in December 2004, MNR issued a press release affirming that the province is working with the committee struck to carry out the recommendations from this *EBR* application and that the province will work with this committee to develop an assessment method that is similar to the approach used for farmlands. The ECO feels that MNR must ensure that any new assessment methodology provides no financial incentive to managed forest property owners to remove trees from their property, nor any financial disincentives to reforesting marginal agricultural lands. Any new assessment methodology for managed forests must properly recognize a property's forest productivity value, and not its development value. This is key to ensuring that MFTIP's goal continues to be met. The ECO will be monitoring MFTIP developments in the future.

Review of Application R2003011:
Review of the *Conservation Authorities Act* and Regulation 170, R.R.O. 1990
(Review Denied by MNR)

Background/Summary of Issues

In February 2004, the ECO received an application for review of the *Conservation Authorities Act* (*CAA*) and Regulation 170, R.R.O. 1990, and similar regulations which relate to fill, construction and alteration to waterways under the *CAA*. The applicants identified concerns with s. 20 of the *CAA* which defines the objectives of a Conservation Authority (CA) as "to establish and undertake, in the area over which it has jurisdiction, a program designed to further the conservation, restoration, development and management of natural resources," and with s. 28 of the *CAA* which defines the regulation-making powers of a CA.

In particular, the applicants requested that the *CAA* be amended to require CAs to make decisions that ensure public safety and minimize environmental damage, and to require their policies, practices and decisions to be "consistent with" the Provincial Policy Statement issued under the *Planning Act*. They also requested that third parties who may be affected by an approval be granted similar rights as persons that are requesting an approval from the CA, such as the right to examine documentation on which a decision is made, submit expert opinions, require a hearing, be given reasons for a decision and appeal to the Minister.

The applicants identified concerns with s. 4 of Regulation 170, R.R.O. 1990, which grants a CA the authority to approve the construction of any building near a waterbody provided the building would, in the CA's opinion, "not affect the control of flooding or pollution or the conservation of land." The applicants suggested that the wording in the regulation and the *CAA* be strengthened to require the CA to demonstrate the basis for its decisions rather than just provide an opinion. This change would be consistent with the language used in the Provincial Policy Statement and would provide courts with the means to determine the reasonableness of a decision.

The applicants were also concerned with s. 5 of Regulation 170, R.R.O. 1990, which lists the documentation that must be filed with the CA as part of an application for approval to construct a building. The applicants noted that CAs should be held accountable for the "accuracy and reliability of its reports" and suggested that s. 5 be amended to require documentation to meet "reasonable standards of completeness, accuracy, and scientific credibility."

To illustrate what could go wrong because of alleged weaknesses in the *CAA*, the applicants described how a proposed townhouse development to be built in the flood fringe of a river was approved by the municipality with input from the local CA. The applicants alleged that the CA provided conditional approval for the townhouse development based on "incomplete, out of date" evidence, and that the CA failed to conduct a "thorough and scientifically rigorous investigation" into matters such as the off-site flood and erosion impacts. According to the applicants, the CA approved a site plan that was subsequently revised to include more space for buildings and less for landscape. In addition, the revision reduces the buffer zone between the development and the riverbank to less than the minimum requirement of 30 metres, and requires all vegetation to be removed even though the approval was based on only a small number of trees being removed. Experts retained by one of the applicants disagreed with the conclusions of the reports relied on by the municipality and the CA regarding the environmental impact of the project. The experts noted that the reports did not meet accepted professional standards and had not been updated to reflect the changes made to the site plans.

The applicants also alleged that the CA failed to require mandatory documents and information from the developer including a request from the municipality for more information to support the environmental impact study that was never honoured, and a missing geotechnical report which was required by the municipality's Official Plan. According to the applicants, the CA also "showed bad faith in its dealings with the public." It held a public hearing to discuss the developer's application even though the site plan reports from the municipality and the CA were not made available until the day before the hearing. As a result, the public did not have sufficient time to review the reports according to the applicants.

Ministry Response

In its response, MNR explained that it denied the application for review since the wording in the *CAA* and its regulations is consistent with the ministry's Statement of Environmental Values, specifically "to protect natural heritage and biological features of provincial significance" and "to protect human life, the resource base and physical property from the threats of forest fires, floods and erosion." In addition, MNR explained that there is very little likelihood of potential harm if the review was not undertaken since land use decisions made under the *CAA* and the *Planning Act* are "intended to protect the environment from incompatible uses."

MNR stated that the *CAA* undergoes periodic reviews and amendments, and program reviews are done periodically with the CAs, including issues related to their role and mandate. According to MNR, the Red Tape review was the most recent review of the *CAA*. However, MNR did not indicate when the Red Tape review was conducted. MNR did indicate that the issue of third party appeals will likely be included in the next periodic review of the *CAA*. Lastly, MNR advised the applicants that their concerns with the development project cited in their application should be addressed to the Ontario Municipal Board.

ECO Comment

The ECO is not convinced that MNR should have denied this application for review. Although MNR stated that it considered the criteria defined in s. 67 of the *EBR* when it denied this application, MNR did not provide enough information to support its decision. For instance, MNR stated that the *CAA* is subject to periodic review and that it was last reviewed during the Red Tape review. However, MNR did not indicate the date of this review and did not say when the next review is scheduled. The ECO notes that amendments to the *CAA* made under the *Red Tape Reduction Act* were enacted in 1998. Furthermore, the ECO doesn't agree that regular program reviews with the CAs are evidence of periodic reviews. Although these reviews are important, they are not the same as a broad-based review of the Act and do not involve the public. Therefore, the ECO does not consider MNR's statements to be evidence of a periodic review and a reason for denying the application.

MNR also did not comment on the applicants' suggestions to amend the *CAA* to ensure that decisions by CAs are "consistent with" the Provincial Policy Statement (PPS) and based on scientifically rigorous information. Since MNR amended the *CAA* in 1998 to bring it into greater conformity with the PPS and since the PPS was recently updated, the ECO believes that MNR should have indicated why a review of the *CAA* was unnecessary from the perspective of conformity with the PPS and the applicants' suggestions.

MNR did indicate that it will likely consider the issue of third party appeals as part of a future review. The ECO urges MNR to work with municipalities and CAs to ensure that the full range of public participation rights for CA decisions are provided. Since the *CAA* is a prescribed Act under the *EBR*, proposals for environmentally significant changes to the Act are subject to the public notice and comment provisions of the *EBR*. The ECO urges MNR to notify the public when it initiates a periodic review of the *CAA* and to provide an opportunity for the public to comment on the Act, its regulations and related policies as part of the review.

The ECO recently received an application for investigation alleging numerous contraventions of the *CAA* and Regulation 170, R.R.O. 1990 (see page 318 of this annual report Supplement). The ECO will review MNR's handling of the application in a future annual report.

Review of Application R2003012: Review of the Provincial Policy Statement (Review Returned by MNR)

Background/Summary of Issues

In February 2004, the applicants submitted an application for review of s. 2.2.3.1 of the Provincial Policy Statement (PPS) under the *Planning Act*. The PPS provides policy direction on matters of provincial interest related to land use planning and development. This section states: "As much of the mineral aggregate resources as is realistically possible will be made available to supply mineral resource needs, as close to markets as possible." The application was submitted to both the Ministry of Natural Resources (MNR) and the Ministry of Municipal Affairs and Housing (MAH).

The applicants were concerned that the current wording of this section of the PPS was vague and open to interpretation. They asserted that this wording risked the adequacy of planning for natural heritage areas, citing the specific example of the Carden Plain. The applicants suggested that the wording of this section of the PPS be changed to: "A 15 year supply of mineral aggregate resource will be secured. It will be composed of all licensed quarries plus resource reserve divided [by] the average annual shipments over the past five years."

Ministry Response
In March 2004, MNR returned this application for review. The ministry stated that it is the responsibility of MAH, not MNR, to make any revisions to the PPS. MNR did state that its staff with the Aggregate and Petroleum Section would assist MAH in their preliminary review of the application. The ministry met the technical requirements of the *Environmental Bill of Rights* in handing this review.

ECO Comment
The ECO concurs with MNR's decision to return this application based on the fact that MAH is directly responsible for the PPS.

Review of Application R2004001:
Review of the Amendment to the Management Strategy for Double-crested Cormorants at Presqu'ile Provincial Park
(Review Denied by MNR)

Background/Summary of Issues
Presqu'ile Provincial Park ("the Park"), located just south of the Town of Brighton, is renowned as a stop-over for migrating waterbirds and monarch butterflies and for its extensive dune system. The Park's population of Double-crested Cormorants (henceforth called "cormorants"), a colony-forming, fish-eating waterbird that nests on the ground and in trees, has increased from one nest in 1982 to 12,082 in 2002 and accounts for 40 per cent of cormorants on Lake Ontario. By 2002, cormorants had killed all of the trees on Gull Island – they had removed foliage and branches, and deposited large amounts of guano (droppings) at the base of the trees. They were also in the process of killing the trees on High Bluff Island particularly in the western woodland that is considered important due to the "age of the trees, the uncommon species association and the rarity of mature forest on islands in Lake Ontario." High Bluff Island is also home to three provincially significant colonial waterbird species that nest in the woody vegetation: Black-crowned Night-heron, Great Blue Heron and Great Egret. Both islands are in the Park and are zoned "nature reserve" which means that they were established "to represent and protect Ontario's geological, ecological and species diversity."

In 2000, the Ministry of Natural Resources (MNR) began a five-year research and monitoring program (Registry Number: PB00E6009) in response to concerns raised by the public and within the government regarding the potential effects of cormorants. Cormorants are thought by some to deplete local fish stocks, degrade water quality and odour, spread disease and parasites, and pose risks to other wildlife and rare habitats. The objective of the research program, which was revised in 2002 (Registry Number: PB02E6004), is to examine the potential effects of cormorants on fish and wildlife populations and on vegetation. The effectiveness of various population control measures is also being tested. Much of the research is being done in the North Channel area of Georgian Bay, another area of Ontario where cormorants are found.

In 2002, MNR approved a cormorant management strategy for the Park (Registry number: PB02E6004.) The objectives of the management strategy are to reduce the number of cormorants to protect the aesthetic beauty of High Bluff Island and to protect the island's western woodland. The management strategy outlined a plan to monitor cormorant populations on the island in 2002, followed by population control measures in 2003-2006 including oiling of cormorant eggs in ground nests, harassing roosting birds and destroying their nests on High Bluff Island. The management strategy indicated that culling, i.e., shooting, was considered as a technique in 2002, but was rejected without detailed analysis in favour of these more benign measures. The management strategy also included measures designed to minimize the effects of the population control measures on the eight other species of colonial waterbirds, including theGreat Blue Heron and Great Egret that nest on the island. In 2003, the management strategy was amended to allow egg-oiling of all cormorant ground nests found on Gull Island in addition to those found on High Bluff Island.

Additional information about the 2002 management strategy and the research and monitoring program can be found in the ECO's 2002/2003 annual report and Supplement.

Results of the 2003 Management Program and Next Steps

The 2003 report on the management of cormorants at Presqu'ile Provincial Park noted that egg-oiling of ground nests was both an efficient and effective population control method since no oiled eggs hatched, but that removal of tree nests was labour-intensive and inefficient for high-level nests, and posed health and safety risks for MNR staff. Despite a 62 per cent decline in successful breeding nests, the number of young recruited increased in 2003 and the number of breeding adults was unaffected. The report also noted that all eight other species of colonial waterbirds produced successful broods, but that cormorants had taken over some of the nests of two of the species – Great Blue Heron and Great Egret.

A 2003 study of the vegetation on High Bluff Island found that most super-canopy trees had been killed and concluded that the remaining vegetation was threatened as cormorants had moved to lower branches. MNR was advised that action was required to protect the western woodland.

2004 Major Amendment to the 2002 Management Strategy

In March 2004, MNR proposed another amendment to the 2002 management strategy to allow a cull of up to 6,000 tree-nesting cormorants on High Bluff Island, harassment and nest destruction in any woody area of High Bluff Island for a three-year period from 2004 to 2006. These measures would be in addition to egg-oiling ground nests on both islands. The objective of these measures to reduce "cormorant numbers on the Presqu'ile islands is to protect woodland habitat." Public consultation on the proposed amendment followed the same process as the 2002 management strategy including a notice on the Environmental Registry (Number: PB04E6007) with a 45-day comment period, direct mailings to interested parties, and newspaper notices.

Prior to MNR approving the amendment in May 2004, the Ministry of the Environment (MOE) received a request that the proposal be bumped up to an individual environmental assessment under the *Environmental Assessment Act.* MOE turned down the request and allowed the cull to proceed for 2004 with the following conditions:

- The effects of the 2004 cull on cormorants and other nesting colonial waterbirds, and the health of High Bluff Island's woody vegetation be assessed in MNR's Annual Monitoring Report.
- A scientific committee be formed to assess the impact of the cormorant cull and make a recommendation to MNR about whether to proceed with the cull in 2005 and 2006 or make further amendments to the Strategy.

Application for Review
Also prior to the 2004 Amendment being approved, the ECO received an application for review from the Animal Protection Institute and Animal Alliance of Canada (the "applicants") asking that the proposal be reconsidered citing numerous scientific and process concerns that are summarized below. The application was forwarded to MNR after the decision to proceed with the amendment was posted on the Registry.

Scientific Concerns
The applicants quoted a Minister's Decision Note dated April 12, 2000, that acknowledges MNR and the Canadian Wildlife Service lack proof that cormorants are causing significant effects on any resource value in Ontario, and that effects on fish stocks are unlikely to be a "sustainable risk." Some of the concerns raised by the applicants include:

- No evidence has been produced that proves cormorants are negatively impacting other nesting birds on the island, local fish stocks, water quality and odour; or that they are transmitting disease or parasites, or posing a risk to other wildlife and rare habitats.
- Insufficient time has passed to determine the effectiveness of the non-lethal population control measures such as egg-oiling.
- MNR has not stated the acceptable number of breeding pairs of cormorants on High Bluff Island. The proposal implies zero breeding pairs since one bird per breeding pair is to be culled.
- MNR has acknowledged that no species at risk are impacted nor are any protected species as defined by COSEWIC.
- MNR acknowledges that population control measures will cause damage to other nesting colonial waterbirds.

In a presentation to the Minister of Natural Resources, the applicants and 13 other groups recommended that MNR take a "hands-off approach to wildlife management in Presqu'ile Provincial Park, allowing cormorants and other species to impact the environment as occurs in any dynamic, healthy ecosystem" and "promote provincial parks as evolving and dynamic ecosystems instead of managing them as green museums frozen in time, protecting 'desirable' habitat and wildlife species for 'certain aesthetic values.'" They also disputed MNR's claim that the woodland on High Bluff Island is rare since MNR has not listed any of the identified species on a protected species list, and since many of the species are common elsewhere within their ranges. The applicants are also opposed to the Ministry's "good" and "bad" species approach to wildlife management and believe that "the cull is about aesthetics, keeping High Bluff Island green and 'beautiful', making it into a museum instead of part of an ecologically vibrant community."

Process Concerns
The applicants also had concerns about the process used to make this decision including:

- The amendment was announced as a "done deal," making public comment largely irrelevant.
- A Minister's Decision Note had indicated that, since the results of egg-oiling can take a couple of years before they become apparent, a cull was necessary if research data about the effects of cormorants on fish stocks were to be obtained within the five-year research and monitoring program. However, a cull was not included as an option in the 2000 and 2002 versions of the program. MNR waited until March 2004 to say that a cull was necessary.

In the presentation to the Minister of Natural Resources, the applicants and 13 other groups recommended that MNR seek a broader public review of its cormorant management program on the basis that the proposed amendment is actually a new management strategy and that there hasn't been enough time to assess the results of the 2003 control measures. The applicants were concerned that approval of this amendment would legitimize the persecution of cormorants just as hawks and owls were once persecuted.

Cormorant Management in the United States

In 2003, the U.S. Fish and Wildlife Service issued its "Final Environmental Impact Statement: Double-crested Cormorant Management in the United States" ("the FEIS"). The FEIS estimates that there are about two million cormorants in North America and notes that human-cormorant conflicts have arisen and that action needs to be taken. Based on recommendations in the FEIS, in fall 2003, the U.S. Fish and Wildlife Service adopted the "Depredation Order for Double-crested Cormorants to Protect Public Resources" which allows various agencies in 24 states to implement population control measures on cormorants that are threatening public resources including fish, plants and habitats without having to obtain individual annual permits. Population control measures may include shooting, egg-oiling, nest destruction and harassment. This Order augments a 1998 Order that allows commercial aquaculture operations in 13 states to shoot cormorants that are threatening their fish and hatchery stocks.

In May 2004, the New York State Department of Environmental Conservation (DEC) announced that it planned to expand current cormorant management in eastern Lake Ontario beginning in spring 2004. For the last ten years, DEC has attempted to stop cormorants from nesting on three American islands and to restrict nesting on Little Galloo Island using egg-oiling and nest destruction techniques with some success. In 2004, DEC planned to continue with these techniques, but also to shoot a maximum of 300 cormorants out of an estimated population of over 8,000. DEC also noted that there are over 2,300 pairs of cormorants nesting on islands in the St. Lawrence River in Ontario that may eventually pose a threat to public resources.

The *Migratory Birds Convention Act* (*MBCA*) between the U.S. and Canada obligates both countries to "conserve and manage migratory birds," "sustain healthy migratory bird populations," and "restore depleted populations of migratory birds." Although the U.S. included cormorants under the *MBCA*, Canada did not. Recently the U.S. considered rescinding protection of cormorants under the Act, but it rejected the idea because it would set a "precedent for removing other species and would undermine the authority" of the *MBCA*. Ontario honours the *MBCA* protection requirement for cormorants under the *Fish and Wildlife Conservation Act*. Unless authorized by the Minister of Natural Resources, it is illegal in Ontario to hunt cormorants or to destroy their nests and eggs.

Ministry Response

In its response, MNR advised the applicants that it had considered the application in a preliminary way to determine whether or not public interest warrants undertaking a review and had decided that a review was not warranted. In particular it emphasized that concerns about the impact of cormorants on local fish stocks were not the basis for its decision to cull cormorants. MNR noted that proceeding with the 2004 Amendment would result in less environmental harm than not proceeding.

In its response, MNR reviewed the application against each of the criteria described in s. 67 of the *Environmental Bill of Rights*. In summary, it noted that:

- The cull is consistent with the ministry's Statement of Environmental Values to ensure the long-term health of ecosystems, the protection of biodiversity and protection of natural heritage and biological features of provincial significance. Based on a 2003 study of the vegetation on High Bluff Island, cormorants were determined to be a threat to woodland habitat and the diversity of woodland species. Since damage had reached a critical level, MNR decided to cull cormorants.
- There is little potential that the environment will be harmed if the review is not done. The cormorant population will be controlled, not eliminated, in the Park. In addition, the results of the 2004 cull and other management measures will be reviewed before the strategy is finalized for 2005. MNR has recognized that there is a risk that other waterbirds may be affected and has taken measures to minimize this risk.
- There has been strong public support for a management strategy for cormorants for years. MNR made its decision based on several recent studies at the Park and elsewhere, and provided a list of these studies.

MNR advised the applicants that control of tree-nesting cormorants is the first step towards a plan to actively restore woodlands on High Bluff Island.

Results of the 2004 Management Program and Recommendations for 2005

In the spring of 2004, MNR culled 6,030 cormorants, oiled eggs in 3,284 ground nests, removed 2,098 tree nests and harassed roosting cormorants.

In January 2005, the Presqu'ile Double-crested Cormorant Scientific Review Committee ("the Committee") presented its recommendations to the Minister of Natural Resources. During its deliberations, the Committee agreed that cormorants must "remain as an abundant tree-nesting species on High Bluff Island" and that "further loss of woody vegetation cannot be avoided" unless the number of cormorants was reduced. The Committee received five recommendations in a written submission from eight groups/individuals and met with four of the authors. The recommendations included cessation of all population control measures, continued monitoring of the colonial waterbirds, continued protection of the island and birds from unauthorized visits and vigilante action, public education about the island's bird colonies, and expanded information sharing and public consultation on cormorant management issues. The applicants were the lead authors on the submission. Of the five recommendations, the Committee agreed to some form of four of the recommendations, but disagreed with the recommendation that all cormorant management activities be stopped. In the end, the Committee recommended the following to the Minister of Natural Resources:

- Culling of tree-nesting adult cormorants on High Bluff Island should be continued in 2005 with a maximum of 5,500 cormorants to be shot. Egg-oiling of ground nests, nest removal and harassment should also continue.
- Limbs should be removed from dead trees to encourage the cormorants to nest on the ground.
- Monitoring of cormorants and other colonial waterbirds, and research efforts should be expanded. The use of control sites to compare nesting habits of non-target species should be investigated.
- Monitoring of woody and herbaceous vegetation on High Bluff Island should be continued.

The Committee made several other recommendations:

- The goals and objectives of cormorant management at the Park should be clarified.
- Park users and the local public should be educated about the islands, the bird colony and the effects of humans on the environment.
- Gull Island and High Bluff Island should continue to be protected from unauthorized visits and vandalism.
- The annual technical review committee of scientists should be continued.
- Public consultation (such as the Environmental Registry) and information sharing should be expanded.

In early May 2005 MNR posted an information notice on the Registry announcing that cormorant management would continue at the park in 2005. According to the notice, "cormorant management techniques will be in accordance with the approved management strategy and will include oiling of eggs in ground-nests, tree-nest removal, culling of up to 5500 tree-nesting adults and disturbance of roosting birds." The notice also stated that "an amendment to the approved strategy is not required. There will be minor operational modifications to the implementation program in accordance with the [Committee's] recommendations." The ECO will review the use of this information notice in our 2005-06 annual report.

ECO Comment

Whether or not to manage cormorants and how to do it have been controversial issues for MNR. In 2002, there was substantial public support for both aggressive and immediate control of cormorant populations, and substantial opposition to the use of population control measures. In 2002, MNR decided on a middle-of-the-road approach – additional research would be done to help fill information gaps and relatively benign control measures would be used in 2003 even though MNR knew that benefits would not be apparent for at least two years. However by March 2004, MNR decided that more aggressive actions were required to reduce the risk that the western woodland would be irreparably harmed and proposed the 2004 Amendment. Again there was both substantial support and substantial opposition.

At the heart of the cormorant management issue and the application for review is whether or not specific species should be managed in order to protect specific values such as habitat and fish populations. Few would question the importance of protecting native habitats and biodiversity. However, there is often controversy over which habitats and which species should be protected and how they should be protected. In addition, does protecting native habitat mean that natural processes should be managed to preserve the current state of an ecosystem or should natural processes be allowed to proceed even if the current state will be changed in the process? The questions that the applicants raise are important and are much broader than the 2004 Amendment.

Also at the heart of the cormorant management issue is a lack of understanding of cormorant behaviour and diet, and of the interdependency of cormorants and other species particularly other colonial waterbirds. The applicants and others continue to question the scientific basis for MNR's decisions, the design of the Research and Monitoring Program and the reliability of the data that is being collected. In our 2002/2003 annual report, the ECO recommended that MNR provide the public with the research results on a proposed cormorant website. The ECO continues to recommend that MNR make this information readily available to the public.

Although the ECO acknowledges that the use of population control measures, including culling may sometimes be necessary, the ECO believes that they should be used only in exceptional circumstances, such as the protection of rare species and ecosystems. Population control measures are a temporary solution that will need to be repeated for years to come unless the factors that contributed to the "over-population" are addressed. They are also expensive and labour-intensive. The other approach is to allow nature to establish its own balance. MNR acknowledges that cormorant activities on the island are natural and that cormorants contribute to biodiversity. However, MNR also believes the cormorants may reduce biodiversity by displacing other tree-nesting colonial waterbirds if too many trees are destroyed. Some environmental groups disagree noting that throughout their range cormorants are found nesting with numerous other species, including gulls, terns, herons and egrets.

MNR has met its obligations defined in the *EBR* for public notice and comment on the 2004 Amendment and has met most of its obligations defined in the *EBR* for applications for review. MNR could simply have denied the application on the basis that the 2004 Amendment had been decided within the last five years and therefore was exempt, but the ECO is pleased to note that MNR chose to provide a detailed explanation using the criteria defined for decisions made over five years ago. However, since the response to the applicants was signed by MNR's *EBR* Co-ordinator, the ECO and the applicants do not know if the requirement for an independent review of the application was met.

The ECO encourages MNR to take a more proactive approach to its cormorant management policy. Although the ECO recognizes that cormorant management must ultimately be decided on a site-by-site basis, there is currently no overriding provincial policy within which to make those decisions. Sites across Ontario with cormorant colonies are turning into "hotspots" of controversy. Demonstrations against the 2004 Amendment took place at both Queen's Park and Presqu'ile Provincial Park and resulted in two people being arrested by the Ontario Provincial Police, although the charges were subsequently dropped. The ECO believes that the lack of a provincial cormorant management policy is contributing to public tension and increasing the risk of civil disobedience. Although MNR has met its obligations for public notice and comment under the *EBR*, waiting until the last minute to post proposals and to make decisions has angered many environmental groups. The applicants have raised important questions that deserve broad and thorough public discussion.

The ECO recommends that MNR develop a comprehensive policy – one that answers questions such as: under what circumstances should cormorant management be undertaken? Should management be undertaken at all, only to protect rare species or habitats, or to protect local values such as fish populations? What management options should be used? What evidence should be provided to make those decisions? Who should be included in the public consultation? Who should make the decision? While the ECO recognizes that it will be impossible to reconcile the widely divergent views on cormorant management, the ECO believes that developing a province-wide cormorant management policy after broad public consultation will ease tensions and provide a framework under which site-specific decisions can be made. The ECO continues to believe that the use of population control measures in general require a long-term commitment of staff and dollars and do not resolve wildlife issues.

Review of Application R2004003:
Ontario Wild Turkey Management
(Review Denied by MOE)

Background/Summary of Issues

In September 2004, an application was submitted to the Ministry of Natural Resources (MNR), requesting a review of Ontario's Wild Turkey Management Plan and the Wild Turkey Program Delivery Area. The applicants also specifically requested a review of the need for a new policy that extends the wild turkey trap and transfer program to include release sites outside the existing program area. MNR currently restricts releases to areas within the mixedwood plain ecozone, and the applicants want MNR to release wild turkeys in the Bancroft area, which is north of that ecozone and outside the birds' historic range.

Wild turkeys, a native species, were extirpated from Ontario in the early 1900s. A reintroduction program began in 1984 with imported birds. Since 1986, MNR has operated a trap and transfer program to introduce the wild turkeys to more areas of the province. The program has successfully re-established wild turkeys in Ontario: In February 2005, MNR estimated that the province's wild turkey population was more than 80,000 birds.

The wild turkey is regulated as a game bird in Ontario. The province initiated a restricted hunt in 1987, and as turkey populations have grown and spread, MNR has gradually allowed increased hunting. In 1994, MNR issued a joint MNR/Ontario Federation of Anglers and Hunters five-year management plan entitled "Wild Turkey Management Plan for Ontario, July 1994". This plan called for the establishment of wild turkeys "in all suitable habitat." Since expiry of that plan in 1999, no new plan has been issued.

Some Ontarians have questioned the environmental impacts of MNR's ongoing trap and release program and sought to decrease the area of program delivery to within the limits of the birds' historic range. In 2003, attempts were made to block the ministry's planned introduction of wild turkeys at a new site, St. Joseph Island, which may be outside the species' historic range. Other Ontarians, such as the applicants in this request, have signalled the desire for expansion of the wild turkey release program beyond the northern edge of the ministry's existing program delivery area. With the increased availability of suitable habitat and winter food, due to land management practices and farming, wild turkeys may be able to thrive in areas beyond their historic range.

The applicants make several different arguments for wild turkey release in the Bancroft area. They suggest that if MNR met the local demand for the establishment of turkey populations, people would be less likely to illegally release farm-reared wild turkeys: such farm-reared birds are, they suggest, bad for the gene pool if they interbreed with the "true" wild turkey populations expanding into the area, and could also spread disease to wild populations.

The applicants also assert that wild turkey release will help build an ecosystem that is "natural and balanced" and enhance viewing, hunting and tourism. Another argument is that the presence of wild turkeys would be good for the environment in Hastings County, by encouraging local landowners to value wildlife and to therefore protect forests. The applicants argue that opposition to expanding the wild turkey range beyond the mixedwood plain ecozone is premised on the potential harm that turkeys might pose to species at risk. They discount this claim, indicating that there is little documentation of wild turkeys having negative impacts on other wildlife or on plant communities, and pointing out that most species at risk are primarily found within the mixedwood plain ecozone.

Finally they argue that, because of the long history of fire suppression in areas such as North Hastings, turkeys scratching in the forest and feeding on fruits and seeds would provide disturbance and seed distribution that would be beneficial for forest regeneration and good for other wildlife. (For more on forest fire management in Ontario, see pages 198-208 of this annual report Supplement.)

Ministry Response

In November 2004, the ministry denied the application. MNR stated that the wild turkey management plan is already under review and that the new plan will define the program delivery area and confirm the policy on determining where to release turkeys. The ministry also explained the rationale for the existing program delivery area.

In its response to the allegation of illegal release of farm-reared birds, the ministry asserted that this was an issue best addressed through enforcement rather than through MNR release of wild turkeys. However, the ministry provided no details regarding enforcement effort, and no indication that these allegations will be addressed.

MNR indicated that the decision criteria for turkey releases have evolved over time, as MNR learned more about the turkeys' habitat needs and capacity for natural range expansion, and as biodiversity objectives and the possible impacts of wild turkey release gained recognition. MNR needed an ecological basis for making turkey release decisions, to ensure that decisions were ecologically sound, fair and consistent.

The ministry described its current criteria for deciding whether to release wild turkeys in a proposed release area as a three-step decision process:

1. First, areas must be within the mixedwood plain ecozone of the Canadian ecological land classification system. The ministry listed a number of reasons for this: locations of previously identified suitable habitat for the wild turkeys are within this ecozone; this area covers the known historic range; the ministry expects that wild turkeys would have expanded through all of this ecozone had they not been extirpated from Ontario; the zone contains the areas of Ontario currently occupied by wild turkeys as a result of past releases and natural range expansion; and they expect that severe winter conditions would limit long-term sustainability of turkey populations north of this ecozone.
2. Next, the potential risks of releasing wild turkey in an area are evaluated, in terms of other fauna and flora, disease, potential nuisance issues, biodiversity considerations or goals for the area, impacts of possible habitat management activities on other species, and genetic concerns.
3. Finally, if satisfied with the above, the ministry evaluates social and economic considerations before proceeding.

In its written response to the applicants, the ministry stated that it has committed resources to the revision of the wild turkey management plan, and that the process is now underway to update the plan that expired in 1999. It stated that the revised management plan, including a section defining the wild turkey program delivery area and the ecological area of Ontario where releases will be considered, will be posted on the Environmental Registry for full consultation. The applicants' comments will be taken into account, and they will have the opportunity to comment further through the Environmental Registry posting process.

However, MNR gave no indication of when such a plan might be ready to post to the Environmental Registry for public comment. In fact, ministry staff members responsible for developing the plan have verbally informed the ECO that the plan did not "expire" in 1999 but continues to be relevant, and that the process of formalising a new plan has not yet been initiated. MNR was forced to articulate its wild turkey management policies more recently, in response to challenges to the St. Joseph Island turkey release plan. The ministry did not at that time, nor has it ever, posted a management plan to the Environmental Registry.

MNR did not meet the technical requirement of the *EBR*'s 60-day time limit for responding to applications. The ministry received the application on September 3rd and did not send a response until November 8th, for a response time of 66 days. However, it did provide a detailed response explaining its decision.

ECO Comment

The ECO concurs with the ministry's decision to deny the applicants' request for a review. In its decision, MNR made a commitment to consult on a revised wild turkey plan through the Environmental Registry. The ECO looks forward to seeing MNR proceed with developing and consulting on a new wild turkey management policy that prioritises environmental goals within the context of a broader provincial biodiversity strategy, rather than narrowly focusing on increased opportunities for turkey hunting (see pages 67-69 of the 2004/2005 annual report for more on Ontario's biodiversity strategy). It is encouraging that in its current decision criteria for wild turkey release sites, MNR has moved beyond its 1994 focus on maximising the turkey population range, and is beginning to take more ecosystem considerations into account.

As reported in our 2002/2003 annual report, the Ministry of Natural Resources made public commitments to develop a Provincial Species at Risk strategy by sometime in 2003. The ECO has recommended that MNR "create a new legislative, regulatory and policy framework to better protect Ontario's species at risk and to conform with federal legislation" (Recommendation 9, 2002/2003 annual report). Given the success of the reintroduction program for the formerly extirpated wild turkey, turkey populations can be expected to continue to disperse to suitable habitats without further reintroduction efforts. The ECO looks forward to seeing MNR now turn its attention to Ontario's many other extirpated, endangered and threatened species which have recovery plans not yet implemented, or for which recovery planning has not yet proceeded. (See "Review of Application R2004013: *Endangered Species Act* and Regulation 328," pages 280-285 below.)

Review of Application R2004013: *Endangered Species Act* and Regulation 328 (Review Denied by MNR)

Background

In November 2004, the Ottawa Valley Chapter of Canadian Parks and Wilderness Society (CPAWS) filed an application for review of Ontario's *Endangered Species Act* (*ESA*) and Regulation 328, R.R.O. 1990. This statute is the primary legal mechanism used by the Ministry of Natural Resources (MNR) to protect species "threatened with extinction" and Regulation 328 lists those species covered by the Act. (For a chart that explains the various categories of species at risk, see page 150 of the 2004/2005 annual report.)

The applicants believe that the *ESA*, while allowing for the protection of some endangered species, has become "outmoded and inadequate as a legislative tool." Further, CPAWS asserts that the current legislation lacks the necessary scope to protect Ontario's species at risk from becoming endangered or extinct. The Act only regulates those species that the ministry considers to be "threatened with extinction," meaning only *some* of those species at risk that are "endangered." MNR also does not regulate species under the *ESA* that are "threatened" or species of "special concern" that it has identified, in contrast to the federal *Species at Risk Act*. Only approximately a quarter of Ontario's 162 species at risk are afforded any of the limited protections of the antiquated *ESA* and there have only been six prosecutions since its enactment in 1972.

The applicants contend that all species that are classified on MNR's Species at Risk in Ontario ("SARO") list, last updated in April 2004, warrant being regulated under the *ESA*. The SARO list is a policy that details which species are endangered, threatened or of special concern, but it lacks almost any legal authority. The Committee on the Status of Species at Risk in Ontario (COSSARO) is the body responsible for deciding on changes to the SARO list and, apart from one academic member, it is composed entirely of MNR staff. CPAWS believes that there are "no conservation-based grounds" on which to exclude the many endangered species not currently listed in Regulation 328 nor species at risk in the other at-risk categories. For example, many species, such as the Barn Owl and the American Badger, are not regulated under the *ESA* despite MNR having identifed them as being endangered in Ontario.

The applicants state that an effective species at risk statute should, among other things:

- *provide a more comprehensive preamble or introductory statement of purpose that would acknowledge not only the need to prevent endangered species from becoming extinct, but also to prevent species of special concern from becoming threatened or endangered;*
- *provide a more comprehensive set of definitions related to species and their protection in Ontario;*
- *provide for conservation measures, including timelines for implementation, that would protect all 'at risk' categories including not only endangered, but also extirpated, threatened, special concern/vulnerable;*
- *eliminate the practice of designating species classifications as 'regulated' and 'non-regulated;'*
- *provide for a process describing assessment and classification procedures, including timelines;*
- *articulate an enforcement, offences and punishment regime that is commensurate with the violation of killing species at risk or destroying their habitat;*
- *acknowledge the important role that provincial parks and protected areas can play in the protection and recovery of species at risk; and,*
- *consolidate under one Act measures to protect species at risk currently appearing in a multitude of forms in legislation and policy documents.*

CPAWS also notes that the Environmental Commissioner of Ontario (ECO), in its 2002/2003 annual report, stated that the ministry already had internally identified the need to revise the *ESA* to harmonize it with the federal *Species at Risk Act*. However, such a revision has not yet occurred. The applicants state that MNR's failure to protect species at risk is inconsistent with specific commitments made in its

Statement of Environmental Values (SEV) that healthy ecosystems will be secured and that "the variety of life – biological diversity – will be conserved."

Legal Protection of All Categories of Species at Risk
While the Act acknowledges the need to protect endangered species, there is no legislative provision for the protection of species in the threatened or special concern categories. CPAWS believes that "this legislative gap fosters a situation whereby species in these categories become more susceptible to a further deterioration of their status, as there is no legislative requirement to take measures to minimize the likelihood of this occurring." The applicants assert that, "while the extent of intervention may vary according to classification level, the conservation of species at risk and their habitat should be legally mandated rather than being left at the discretion of policy."

CPAWS states that species should not be subject to "arbitrary administrative classifications" that may result in an unnecessary delay of conservation measures. For example, species facing imminent extinction or extirpation in Ontario may be designated as "endangered-regulated" or "endangered-not regulated." If they are designated "endangered-regulated" they are afforded legal protection under the Act. If they are designated "endangered-not regulated" they are not. The applicants believe "this dichotomization of the most critical classification confounds the purpose and integrity of the *ESA* and creates confusion among the public."

Reform of the Classification Process
CPAWS states that "the *ESA* is mute on the body responsible for reviewing reports and assigning classification levels, including the information on which the classification decisions will be based." There are no legislated timelines for frequency of review or, in cases where species have been reviewed and classified federally by the Committee on the Status of Endangered Wildlife in Canada (COSEWIC), the time by which the provincial body must review or update its own classifications.

The applicants are concerned that "the absence of legislated timelines may be depriving some species of the protection that would ordinarily be afforded to them had they been classified in a more timely manner." For example, the applicants note, the eastern wolf was federally designated as a species of special concern in April of 2001, but it was not until September 2004 that MNR finally designated it on its own SARO list, despite assurances for several years that it had been their intention to do so. Had there not been a three-year delay, the applicants believe that the eastern wolf would have benefited from certain prohibitions on hunting in provincial parks between 2001 and September 2004.

Increased Enforcement Provisions and Penalties
CPAWS states that the Act provides for a maximum fine of $50,000 or imprisonment for a term of up to two years or both for "persons", but leaves unaddressed offences committed by corporate bodies and does not provide for the commission of offences that are repeated, that affect a multitude of species, or that are sustained over time. The applicants believe that a revised *ESA* "should articulate a more detailed and escalating inventory of legal measures that would be available in instances where the law protecting species or their habitat has been broken."

Legal Protection for Species at Risk in Protected Areas
The applicants assert that protected areas should serve as benchmarks for the perpetuation of indigenous species and ecological processes. CPAWS believes that full legal protection should be granted for species in all at-risk categories in provincial parks and conservation reserves.

CPAWS notes that the ministry did have a policy whereby species listed provincially as endangered-not regulated, threatened, or special concern would all be afforded the same level of protection in provincial parks as endangered-regulated listed species. However, in September 2004, this policy was altered, without notifying the public or inviting public comment, to permit the exclusion of species of special concern when MNR judges it "not appropriate" to include them. (This unposted decision is discussed on pages 4-5 of this Supplement.)

The applicants believe that "the fate of all categories of species at risk is too important to be left to localized decisions that can be made without public notification, public consultation, or accountability as happened with species of special concern in Ontario's provincial parks in September 2004." Therefore, CPAWS believes that the protection for species in all at-risk categories in Ontario's protected areas must be provided through a revision of the *ESA*.

The *ESA* should be the primary tool to achieve the protection and recovery of species at risk, according to the applicants. While other statutes, regulations and policies may refer to the *ESA*, the applicants believe that a single comprehensive statute is needed that provides clear direction. CPAWS raises concern with "what appears to be a confusing diffusion of responsibility and accountability for species at risk, which may result in less protection than is intended or required to prevent species from becoming extinct."

Further, the applicants caution that there is "no yardstick against which to measure progress, and therefore no accountability, since the protection of species at risk is not the primary objective of these other statutes or policies." CPAWS believes that measures to address species at risk must be explicitly articulated within the *ESA* itself, rather than left to be inferred from other pieces of legislation or their associated regulations or policies.

Ministry Response

In January 2005, the ministry denied the *EBR* application, asserting that the public interest does not warrant a review. In an apparent contradiction, MNR then states that the current Minister of Natural Resources has publicly stated several times that the government will be initiating a review of the *ESA*. However, the details around process and timing have not yet been confirmed, according to the ministry.

MNR also notes that in March 2003, the current Premier, then the Leader of the Official Opposition, promised to "update and strengthen Ontario's *Endangered Species Act*. Our new Act will put in place effective measures to protect species at risk, including a science-based process to list species and help them recover, and meaningful protection for habitats. Protection of species is virtually meaningless unless these are also protected."

The ministry states that there is no potential harm to the environment if a review is not undertaken. It rationalizes this claim by stating that the government has already committed to a review and that a suite of existing legislation provides for the adequate protection of species at risk. In contrast, the ECO notes that one of the central arguments made by CPAWS in its *EBR* application is that this suite of legislation does not effectively protect species at risk.

MNR did not address most of the concerns raised by the applicants. The ministry does state that the concerns raised in this *EBR* application will be considered when the ministry does in fact conduct a review. The ministry states that it will use the Environmental Registry for public consultation and that the applicants will be given specific notice when a review does occur.

In February 2005, subsequent to denying the *EBR* application, MNR released its new strategic directions framework entitled "Our Sustainable Future." According to the ministry, it details "specific strategies and proposed actions to help us plan activities and deliver results that are aligned with our strategic direction." In this document, MNR commits to "review the *Endangered Species Act*." At the same time as the release of this document, MNR has shifted internal responsibility for species at risk from its Ontario Parks Branch to a new Biodiversity Section within the Fish and Wildlife Branch.

In March 2005, MNR released its draft Ontario Biodiversity Strategy. As part of this initiative, the ministry states that it will "review and implement updated Ontario species at risk legislation to provide broader protection for species at risk and their habitats, and to include requirements for recovery planning, assessment, reporting and enforcement." However, the strategy does not include any timelines for the revision of the *ESA*.

Themes and Links

In our 1999/2000 and 2001/2002 annual reports, the ECO reported that species at risk are inadequately protected in Ontario because of a confusing blend of generally outmoded and ineffective laws and policies. In both reports, the ECO encouraged MNR to initiate the necessary public debate to assess options that would effectively prevent the loss of species and their habitat in Ontario, including options to improve recovery planning and implementation.

As reported by the ECO in 1999/2000 and 2002/2003, similar applications under the *EBR* were denied by the ministry. As with these cases, the ECO disagrees with MNR's decision to deny the review as CPAWS raised legitimate concerns in requesting that all species at risk receive adequate legal protection. As reported in our 2002/2003 annual report, the ECO noted that MNR had already internally identified the need to revise the *ESA* to harmonize it with the federal *Species at Risk Act*, which was passed the federal government in 2002. Further, the ministry also had committed itself publicly to developing a provincial species at risk strategy by 2003. At that time, the ECO recommended that "the Ministry of Natural Resources create a new legislative, regulatory and policy framework to better protect Ontario's species at risk and to conform with federal legislation." Since then, MNR has not revised the legislation nor has it introduced a species at risk strategy.

MNR reports annually on its program achievements and targets as part of the government's results-based planning initiative, including reporting on endangered species. This reporting is based on the percentage of provincially endangered species, excluding fish and mollusc protected under the federal *Fisheries Act*, included on its Species at Risk in Ontario list that receive regulatory protection under the *ESA*. In 2003-2004, the percentage of endangered species regulated was 64.5 per cent. In 2004-2005, the percentage is projected to be 69.4 per cent. The target is to achieve regulation of 75.8 per cent of endangered species in 2005-2006. The ECO questions the value of these targets as it should be assumed that all endangered species should be regulated.

The ECO believes that effective results-based reporting would detail the number of implemenected recovery plans and the number of species successfully delisted or downgraded in their at-risk status. A recovery plan outlines the long-term goals and short-term objectives for recovering a particular species at risk. These plans include information on what is known about the species, what information is still needed, the threats to its survival, and an identification of its critical habitat.

ECO Comment

The ECO agrees with the applicants that a review of Ontario's *Endangered Species Act* is needed. A request to review a piece of environmental legislation that is more than 30 years old is an excellent use of the *EBR*'s application for review provisions. There is consensus among the leading experts on species at risk in Canada that an overhaul of Ontario's measures to protect species at risk is long overdue.

In February 2005, MNR released its new strategic directions framework entitled "Our Sustainable Future." This framework establishes a new direction for the ministry to increase its emphasis and activities in several key areas, all with the underlying mission of "ecological sustainability." The conservation of biodiversity, including the protection of species at risk, is now recognized as a priority for the ministry.

MNR's new mission of ecological sustainability represents an ideal opportunity for the ministry to expand and develop programs that protect Ontario's species at risk. Such species merit protection for their own sakes, but they also serve as a valuable barometer of the state of Ontario's natural environment. The ECO believes that concerted and measurable action by the government to protect these species will benefit all Ontarians.

Historically, one of the most significant challenges for the government has been engaging private landowners and addressing issues surrounding property rights. Private landowners have a considerable role in protecting species at risk, particularly in southern Ontario. For example, the Carolinian ecological zone in southern Ontario covers only 1 per cent of Canada's land area, but it is home to approximately one-quarter of all of Canada's species at risk and one-quarter of the country's population.

In some instances, species at risk can only be found on privately owned land. The ECO raised concern in our 1999/2000 and 2002/2003 annual reports that MNR was delaying the regulated protection of these species because of its protracted landowner consultations. However, MNR does have a valuable toolkit of existing programs that could be used more effectively, such as the Conservation Land Tax Incentives Program (CLTIP) and the Managed Forest Tax Incentive Program (MFTIP). While currently limited to tax incentives for protecting the habitat of endangered species, such programs could be expanded to provide financial incentives to private landowners to protect the habitat of all types of species at risk. The ECO also believes that property easements for conservation purposes could be utilized more broadly.

MNR's mission of ecological sustainability also gives the ministry an opportunity to take a greater role in protecting aquatic species at risk. The protection of aquatic species is a federal constitutional responsibility of the Department of Fisheries and Oceans (DFO), empowered under the *Fisheries Act* and the *Species at Risk Act*. MNR has voluntarily cooperated with the federal government on several multi-species recovery plans in Ontario. However, this remains a grey area of the law as DFO's jurisdiction is generally limited to federal lands or what takes place in waters "frequented by fish." Threats to species at risk are not bound by such neat jurisdictional divisions and what takes places on adjacent lands – the province's jurisdiction – is often equally important. The ECO encourages MNR to take an active role in protecting these species, in a similar fashion to what it has done in assuming the responsibility for Ontario's lucrative sport fishery.

Review of Application R2004014:
Review of the *Aggregate Resources Act* Part VI and Ontario Regulation 244/97
(Request for Review Denied by MNR)

Background/Summary of Issues
The applicants requested a review of Part VI of the *Aggregate Resources Act* and of Ontario Regulation 244/97 as it relates to aggregate resource fees. This request for review is rooted in the findings of a report prepared by the Pembina Institute, entitled "Rebalancing the Load – The need for an aggregates conservation strategy for Ontario." As its title implies, the report calls for the "development and implementation of a comprehensive strategy for the management and conservation of the province's aggregate resources." The report recommends that the strategy should "reduce the overall demand for aggregate resources" and "maximize the substitution of secondary materials for newly extracted aggregate."

The applicants also requested a review of the Ontario *Building Code Act* and relevant development standards both to encourage more compact urban development and the acceptance of alternative materials for construction in an overall effort to promote the preservation of aggregate resources in the province.

The ECO forwarded the request regarding the *Building Code Act* to the Ministry of Municipal Affairs and Housing (MAH) and the request regarding development standards to the Ministry of Public Infrastructure Renewal (MPIR). However, the ECO acknowledged in a letter to the applicants dated March 30, 2005, that neither MAH nor MPIR are under any obligation to consider these requests as the *Building Code Act* is only prescribed for the purposes of review with respect to septic systems under the *Environmental Bill of Rights*, while MPIR is not a prescribed ministry.

Ministry Response
MNR denied this application in April 2005. It justified doing so, in part, because it had decided to undertake another review that it felt covered similar issues and concerns. According to MNR, Ontario is viewed by experts in the recycling industry as one of the leaders in the field in North America and there have been many success stories. Ontario remains committed to building on this success. Further, MNR staff is currently participating on a committee, in collaboration with MTO and MOE, to develop a provincial conservation strategy for aggregate resources. MNR also indicates that it will seek to broaden the scope of the membership of the current conservation strategy committee by encouraging additional ministries (e.g., MAH, MPIR, MNDM, and MOF) to participate on the committee. See pages 286-287 of this Supplement for more details on this other review.

ECO Comment
The ECO will review MNR's handling of this application in our 2005/2006 annual report.

Review of Application R2004015:
Motorized Off-Road Vehicle Events on Crown Land under the Free Use Policy
(Review Undertaken by MNR)

Background/Summary of Issues
In March 2005, the ECO received an application for review of MNR's policy governing off-road motorized vehicle events on Crown land. MNR's Free Use Policy (PL 3.03.01) under the *Public Lands Act* requires an off-road vehicle event organiser to obtain written authorization from the ministry. The event organiser must provide a refundable deposit as a guarantee against property damage, and commit to keeping vehicles on the assigned trail route for the event. MNR introduced these requirements in 2004 without public consultation, and failed to post a proposal notice on the Environmental Registry (for more details on this unposted decision, refer to pages 7-8 of this Supplement). The applicants believe that off-road vehicles are causing environmental damage, and cite damage at Greens Mountain, in Haliburton County, as an example.

Ministry Response
In April 2005, MNR notified the applicants and the ECO that the ministry would undertake to review the parts of the Free Use Policy that pertain to off-road vehicle events on Crown lands. MNR did not indicate when it expects to complete the review.

ECO Comment
The ECO will review the handling of this application once the ministry has completed its review.

Review of Application R2003008:
Rehabilitation of Ontario Pits and Quarries
(Review pending by MNR)

Background/Summary of Issues

In November 2003, the ECO received an application arguing that Ontario's pits and quarries are not being adequately rehabilitated by the aggregate industry, and requesting a review of sections of the *Aggregate Resources Act (ARA)*. The applicants represented a citizens' group called Gravel Watch, which also issued a news release alleging that Ontario's gravel pit operators are not complying with rehabilitation regulations, and stating that "less than half of excavated land is actually being rehabilitated." The applicants noted that under the current situation in Ontario, approximately 6,000 hectares per decade are being degraded by aggregate operations, without rehabilitation. The applicants also requested a review of s. 6.1 of the *ARA* relating to an Aggregate Resources Trust. Responsibility for this Trust, the applicants argue, has been inappropriately assigned to a company wholly owned by the Aggregate Producers of Ontario, in effect allowing an industry lobbying association to control and spend public money on rehabilitation work, without adequate public accountability. (See also pages 142-143 of the ECO's 2004/2005 annual report.)

Ministry Response

MNR confirmed on January 31, 2004, that it would undertake the requested review. Although the ministry indicated in July 2004 that the review was very near completion, the applicants have since been notified several times that the review is still ongoing. In April 2005, the ministry sent the applicants an update letter, stating: "While the complexities of this review have certainly extended the process beyond our original estimation, I want to assure you that MNR remains fully engaged in the process and that there is a keen interest at all levels in the ultimate decisions flowing from this review process."

ECO Comment

A set timeline for ministries to conduct reviews is not stipulated by the *EBR*, but the Act does state that ministers "shall conduct the review within a reasonable time." While a review period of 1.5 years is lengthy, it could be considered reasonable if the ministry was indeed continuing to actively evaluate complex issues. However, it would be neither reasonable nor appropriate for a ministry to delay the release of an otherwise completed review. At this point, the ECO assumes that the former situation applies, and urges MNR to expedite the completion and release of this review, which seemed near completion in July 2004.

On April 22, 2005, MNR declined a similar but separate request for review of certain aspects of the *ARA*, its regulations and related policy (see pages 285-286 of this Supplement). MNR's rationale for declining this second request was based in large measure on the fact that the ministry was already engaged in the review requested by Gravel Watch. A full review of MNR's handling of both applications will appear in our 2005/2006 annual report.

SECTION 6

ECO REVIEWS OF APPLICATIONS FOR INVESTIGATION

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ECO REVIEWS OF APPLICATIONS FOR INVESTIGATION

MINISTRY OF THE ENVIRONMENT

Review of Application I2003009:
Alleged Contraventions of the *Environmental Protection Act* and the *Waste Management Act* (Investigation Undertaken by MOE)

Background/Summary of Issues

In February 2004, the applicants filed an application for investigation alleging contraventions of the *Environmental Protection Act* (*EPA*), specifically ss. 14, 15, 31, and 40, and the contravention of the *Waste Management Act* (*WMA*), specifically s. 12. They allege that the Township of Cramahe illegally operated a waste disposal site at Lot 11, Concession 5, Cramahe Township in the 1970s, and that waste continued to be deposited after the site was closed. One of the applicants states that his 22 metre deep residential well is within 46 metres of the former landfill site.

The applicants alleged that the site had never operated under a certificate of approval (C of A) and that the site had caused adverse environmental impacts. The applicants raised concerns with regard to offensive odours. Further, they also were concerned with the effect of the disposal of material, specifically large volumes of plastic, from an industrial fire that was deposited at the site in 1978. The applicants were also concerned about alleged adverse effects on their residential well water.

The applicants also filed an application for investigation with the Ministry of Natural Resources (MNR) alleging a contravention of the federal *Fisheries Act*, specifically s. 35 (see page 315 of this Supplement).

Prior to submitting this application for investigation under the *EBR*, one of the applicants attempted to resolve their concerns by means of the office of the Ontario Ombudsman. At that time, the response from the Ministry of the Environment (MOE) was that the ministry's historical dealings with the waste disposal site were consistent with program delivery at that time; that the applicant should attempt to resolve their concerns at the municipal level of governance; and that MOE is not aware of any adverse impact to the natural environment resulting from the closed landfill site.

One of the applicants also submitted a petition to the federal Commissioner of the Environment and Sustainability with regard to this site. Staff with Environment Canada subsequently inspected the site, noting that no background surface water was evident east of the location and that roadside ditches were dry. Environment Canada also noted that no downstream surface water was evident within 500 metres south of the location, but staff did collect legal samples from a bog to be examined by experts. Environment Canada concluded that there was no evidence of a contravention of the *Fisheries Act*.

Ministry Response

MOE did conduct an investigation into the issues that were raised by the applicants. The ministry concluded that there was no evidence of impairment or adverse effects and no basis for charges for alleged offences not barred by limitation periods. MOE stated that there was insufficient evidence to support any of the alleged offences against the Township of Cramahe under the provisions of the *EPA*, the *Ontario Water Resources Act* (*OWRA*), and the federal *Fisheries Act*.

Based on documentary evidence and the testimony of witnesses, MOE stated that the site in question was never owned by the Township of Cramahe. The site was privately owned, but it was under contract for waste disposal by the Township of Cramahe during the 1970s. This site was approved for waste disposal in 1968, prior to either federal or provincial legislation requiring a C of A. At that time, the local Medical Officer of

Health and the Waste Management Section of the provincial Department of Health approved the site. The site accepted domestic, commercial, and industrial non-hazardous waste material.

In 1971, the Waste Management Section of the Department of Health became responsible for waste disposal sites under the authority of the *WMA*. Approvals were then required for all new waste disposal sites, but those sites that were previously approved were excluded. In 1972, MOE was established and the *WMA* was repealed. It was replaced by the *EPA* and Cs of A were required for all sites, both new and existing ones.

In 1977, MOE initiated a comprehensive waste site inventory to ensure that all sites were in compliance with the *EPA*. The site in question was inspected and the owner was notified that a C of A was now required in order to continue waste disposal operations. In 1979, the site was closed as the owner did not obtain a C of A.

In 1989, MOE inspected the site at the request of the Township of Cramahe when it sought to map the site in its municipal Official Plan. MOE conducted a hydrological assessment of the site, determining that there was no impairment to a nearby creek or the water table.

In 2004, as a result of the investigation initiated under the *EBR*, MOE inspected the site again. Ministry staff noted that the area where the former waste site is located is drained by an intermittent watercourse that was dry on each of several visits to the site. MOE states that the *Fisheries Act* only applies to "waters frequented by fish," although the definition of fish is broad. However, based on several inspections of the site, the ministry concluded that there was no evidence of a deleterious substance or destruction of fish habitat that would warrant any charges. Ministry staff also did not note any detectable odour at or adjacent to the site.

With regard to the waste deposited at the site in 1978 from a fire, MOE interviewed the former owner of the industrial site in question and a former municipal Councillor from the municipality where the fire occurred. These individuals clarified that some burnt plastic material was disposed of at the site, but that it was generally composed of fire-damaged cat and dog food.

With regard to the applicants' concern of alleged residential well water contamination, MOE noted that a report from the County of Northumberland Health Unit indicated that the bacterial analysis of the applicants' well water was not an appropriate leachate indicator. This report also noted bacterial contamination of well water is typically related to a deteriorating or improperly constructed well or septic system. MOE also concluded that the hydrological site assessment that was conducted in 1989 was sufficient and an additional assessment was not warranted.

ECO Comment

The ECO commends the ministry for undertaking this investigation, but is concerned that MOE did not test the water quality of the applicant's well water. MOE relied on its hydrological assessment of the site from 1989 in determining that further groundwater testing was not warranted for the purposes of this investigation. The ministry did not explain the content or details of this 15-year-old hydrological site assessment in its response to the applicants. MOE should have explained why it concluded that the 1989 site assessment was still valid.

The ECO also believes that MOE should have tested the applicant's well water to determine if it is currently impaired. The ministry's testing of the well water could have indicated whether leachate from the former landfill was affecting the water quality on the applicant's property. This testing is necessary as the leachate plume may have migrated in the 15 years since the last hydrologic assessment was done.

A bacterial analysis of the applicants' well water had been more recently done, but, as MOE itself noted, this analysis was not an appropriate leachate indicator. MOE should have tested a sample of the applicant's well water for chloride, organics, metals, dissolved organic carbon, and other indicators of contamination by leachate from the former landfill. At a minimum, this new testing would have reassured the applicants that the water quality on their residential property was safe for consumption.

Review of Application I2004001: Alleged Contraventions of the *EPA*, *OWRA* and *EAA* by McNabb Drain Development (Investigation Undertaken by MOE)

Background/Summary of Issues

The McNabb Drain is a constructed drainage system that was originally established in 1903 as an "Award Drain" under the *Ditches and Watercourses Act*, one of five statues that were repealed and merged together in 1963 to create the *Drainage Act*, the key law used for constructing and maintaining agricultural drains. The *Drainage Act* is not prescribed for investigations or reviews under the *Environmental Bill of Rights (EBR)*. Located in Ramara Township in the northeast quarter of the Lake Simcoe drainage basin, the McNabb Drain watershed receives runoff from approximately 511 hectares of predominantly agricultural land. The watershed is fairly flat with grades of less than 0.1 per cent for the most part, but downstream of County Rd. 47 slopes increase to 0.8 per cent for the artificial drainage channel section. Below the confluence of the drain with the natural stream channel, the gradient increases to above 1 per cent.

The ECO received this application for investigation on April 5, 2004 and forwarded it to the Ministry of the Environment. In their *EBR* application, the applicants alleged that an industrial park and its drainage, constructed under Ramara Township's authority in the 1980s, as well as changes to the existing McNabb drain resulting from Highway 12 construction, resulted in discharge of contaminants to water, contravening the *Environmental Protection Act (EPA)* and the *Ontario Water Resources Act (OWRA)*. The applicants cited the *EPA* s. 14(1) which states "…no person shall discharge a contaminant or cause or permit the discharge of a contaminant into the natural environment that causes or is likely to cause an adverse effect." Reference also was made to the *OWRA* s.30 (1) which states "Every person that discharges or causes or permits the discharge of any material of any kind into or in any waters or on any shore or bank thereof or into or in any place that may impair the quality of the water of any waters is guilty of an offence."

The applicants also alleged that changes to the drainage system were not authorized under the *Drainage Act*, in violation of its s. 3(18). For the purposes of this review, however, it should be noted that the *Drainage Act* is not a prescribed Act under section 9(1) of O. Reg. 73/94 made under the *EBR*. In addition, the applicants alleged contraventions of the *Lakes and Rivers Improvement Act* and the *Fisheries Act*. These issues were dealt with separately by the Ministry of Natural Resources (see the review of I2004002 on pages 315-318 of this annual report Supplement).

In the late 1970s, a number of significant changes took place in the upper parts of the McNabb watershed, where land had been rezoned industrial by the township. Subsequent land use changes in this area included the establishment of a quarrying operation operated by Lafarge Canada Inc., and the construction of Brechin Industrial Park beginning in 1986. The Township of Ramara followed the appropriate Official Plan amendment procedures of the *Planning Act* during the development of the Brechin Industrial Park, but the applicants believed that a certificate of approval for the associated drainage system works should have been obtained as required under the *OWRA* s. 53. Section 53(1) of the *OWRA* states "No person shall establish, alter, extend or replace new or existing sewage works except under and in accordance with an approval granted by a Director." Further, such works were argued to have been subject to environmental assessment under the Municipal Engineers Association Class EA (for municipal sewage works). In addition, the applicants alleged that the construction of the drainage culvert during this time period (under the direction of MTO) at Highway 12 was done in contravention of the *EAA* ss. 5 and 6.

In spring 1998, flooding and damage occurred at a number of properties along the lower natural section of the stream, and very turbid discharges from the McNabb Drain were observed at the outlet to Lake Simcoe. Landowners linked these observations to work that had been done to address drainage problems on and near the industrial park in 1997. In that year, the industrial areas were graded, and a roadway and drainage ditches were constructed to service a new subdivision. Two property owners near the industrial area also initiated a contract to improve drainage for their properties and received some financial support from the Township of Ramara because the work also improved the drainage of the industrial park. The agreement to carry out this work was done in a manner similar to the provision for a "mutual agreement drain" under s. 2 of the *Drainage Act,* although the formal process under the *Drainage Act* was not followed. The original 1903 McNabb Award Drain was largely replaced and enlarged in this area during the course of the 1997 work. The applicants claimed that the drains that were constructed were of very poor design and resulted in significant sediment erosion and loading to the downstream areas, including Lake Simcoe.

Between 1998 and 2002, erosion, flooding and sedimentation resulting from runoff and snowmelt events continued to be observed. Frustrated by unsuccessful attempts to have these problems addressed by various government agencies, some of the affected landowners finally decided to take legal action. Two civil suits, seeking compensation for damages and remediation, were initiated at the Superior Court of Justice in the summer of 1999 by landowners. The suit named the Township of Ramara, Standard Industries, a number of landowners and a drainage contractor. In November 1999, the Superior Court Justice hearing the case invoked s. 120 of the *Drainage Act*, which allows for transference of matters from the civil courts to the jurisdiction of the Drainage Referee. All parties agreed to the court's consent order transferring the case.

Early in 2000, the Drainage Referee ordered the Township of Ramara's Drainage Engineer to prepare a report that recommended an interim control plan to mitigate any further occurrences of damage and flooding during the spring freshet, and to remediate damages done to date. The plan included cleanout of the marina area at Point of Mara, enlargement of a road culvert, cleanout of existing on-line ponds, and construction of two small stormwater management (SWM) ponds. The Ontario Drainage Referee ordered that these works be constructed and a further hydrological study be done by the township's Drainage Engineer. The subsequent hydrological study showed a number of under-designed culverts in the watershed, i.e., flow restrictions unable to accommodate frequent runoff events, and found that the changes to the original drainage scheme up to 1997 had resulted in significant peak flow increases in the drainage system.

Some residents were not convinced that the interim control plan would be effective, in particular claiming that the two small SWM ponds were inadequate to accommodate the storm runoff from the industrial subdivision area. The recommendations of the interim report were implemented between early 2000 and September 2002.

In early 2000, the Drainage Referee ordered Ramara Township to retain the services of an engineer to prepare a drainage report pursuant to s. 8 of the *Drainage Act.* The report was produced May 15, 2001, and was the subject of hearings over the next several months. In September 2002, the Township of Ramara awarded a contract to implement the McNabb Municipal Drain plan.

Following the implementation, in 2001 and 2002, of the interim control plan ordered by the Ontario Drainage Referee, the applicants allege that continuing and further contraventions of the *OWRA* and the *EPA* occurred. These were said to result from under-designed and poorly designed features of the interim plan, e.g., a small stormwater management pond west of Highway 12, which the applicants claim was seriously deficient in size to accommodate upstream runoff from the industrial areas.

Based on the engineer's report of May 15, 2001, the construction of the McNabb Municipal Drain was initiated in September 2002. The new drain plan included several open drainage channel sections and two stormwater management ponds. One of these was designed to handle runoff from the Brechin Industrial Park and the other, located on the Lafarge property just downstream, was designed "to reduce flows from the lands east of Highway 12 to a level that the drain west of the highway could accept without substantial improvement." At the hearings held before the Drainage Referee on the drain design, residents had called several aspects of the design into question including the adequacy of the two SWM ponds to protect the downstream lands. Applicants further stated that *OWRA* s. 53 approval should have been required from the Ministry of the Environment (MOE) for construction of both these SWM ponds. Moreover, they believed that the Municipal Engineers Association Class EA for municipal works should have been applied in the case of the SWM facility on the industrial park land. The township did apply for *OWRA* s. 53 approval from MOE in December 2002, but the ministry subsequently returned the application indicating that the project was subject to the Municipal Engineers Association (MEA) Class EA.

The applicants alleged that continuing and further contraventions of the *OWRA* and *EPA* occurred as a result of the construction of the McNabb Municipal Drain between September 2002 and the date of filing of the *EBR* application. The applicants also drew attention to the enlargement of the culvert which was done to carry drainage under Highway 12, as called for by the May 2001 drainage plan developed by the township's engineer. They believe that the Ministry of Transportation (MTO) should have been involved and should have applied its Class EA to this undertaking, and they specifically allege a contravention of the *EAA* s. 5(1).

Ministry Response

The ECO received this application for investigation on April 5, 2004 and forwarded it on to MOE. MOE advised the applicants that it would be conducting an investigation under s. 74 of the *EBR*, and reported back to the applicants on September 3, 2004. In its report, MOE mentioned that prior to receipt of this application, it had already been responding to allegations of contraventions of the *OWRA,* the *EPA* and the *EAA,* but that upon receipt of the *EBR* application, it had "expanded the scope of its inspections to include the culvert on Highway12 and the allegations raised against the Ministry of Transportation."

MOE's investigation resulted in a decision by the ministry to issue a Director's Order, dated August 31, 2004, requiring the Corporation of the Township of Ramara and Lafarge Canada to undertake a number of actions, including assessing and reporting on the sewage and drainage works undertaken in the McNabb Drain watershed, and submitting an application for approval of any works subject to s. 53 of the *OWRA*. The ministry stated in its report that the McNabb Drain is "dysfunctional and unstable," but that it believed the response to this Order would result in mitigation of any potential for further adverse impacts in the watershed. The proposed Director's Order, as a prescribed instrument under the *EBR,* was posted for public comment on the Environmental Registry for a 30-day review period on March 1, 2004. An amendment was made, based on a submission by the applicants. The amendment clarified that all sewage works were to be assessed, including works intended for agricultural purposes only. Among other things, MOE stated that compliance with this Order would provide it with the necessary information to address the issues raised in the *EBR* investigation, at least those issues raised in connection with construction of sewage works without approval. In compliance with this Director's Order, a report was commissioned from K. Smart Associates Limited and was completed on October 31, 2004.

MOE addressed the specific allegations of contraventions of *OWRA* s. 53(6) in terms of drainage construction activities in the watershed prior to and subsequent to June 5, 1997. On that date, revisions to this section clarified the exemptions from approval requirements for drainage works. Prior to that date exemptions for drainage works were broader. Section 53 did not apply: "(d) to a sewage works the main purpose of which is to drain agricultural lands; (e) to a drainage works under the *Drainage Act*…" Under the 1997 amendment, the exception became: " (6) This section does not apply… (d) to a drainage works under the *Drainage Act* or a sewage works where the main purpose of the works is to drain land for the purpose of agricultural activity." Regarding the drainage works for the Brechin Industrial Park, which were built prior to 1997, the ministry stated that "Due to the broad nature of this [pre-1997] exemption, any works that were undertaken under the *Drainage Act*, regardless of the purpose of the works, were exempt from section 53 approval requirements under the *OWRA…*" It is also noted that a similar exemption was made for agricultural drainage in 1997 with the introduction of the MEA Class EA.

Regarding potential contraventions of the *EAA* resulting from not applying the MEA Class EA, MOE goes on to state: "Even if the municipality cannot show an applicable approval or exemption for the works, the six month limitation for contraventions under the *EAA* in the *Provincial Offences Act* may mean that prosecution is not an option in this allegation and all other allegations made by the Applicants that related to alleged contraventions of the *EAA*."

Regarding contraventions of the *EAA* associated with construction of the culvert crossing of Highway 12, MOE's response was essentially that it would await the result of the report it ordered the township to prepare in August 2004, concerning the statutory authority under which works were carried out.

In response to the applicants' allegations of contraventions of the *OWRA* ss. 30(1) and 30(2) and the *EPA* s. 14(1), MOE explained that there was no complaint filed at its offices during the period of alleged contraventions, and that therefore it would not be possible for MOE to establish a causal link between observed water quality impacts and alleged sources. The response also stated that MOE's Barrie office staff instructed the applicants on how to file an official complaint that could lead to an MOE investigation and possible enforcement procedures.

Regarding the planning and construction of the Highway 12 culvert crossing built in 2003, the applicants had alleged a contravention of the *Environmental Assessment Act*, stating that MTO should have applied its Class EA. MOE stated in its response that MTO is considered a benefiting landowner, and its role was to pay the municipality for work undertaken in its Right of Way; as the proponent, the municipality may have also been obligated to apply the MEA Class EA prior to construction. MOE again deferred a decision on this until the assessment report included in the Director's Order was received.

Update on Additional Developments

The township and Lafarge Canada responded to the Director's Order by filing an appeal with the Environmental Review Tribunal (ERT). Among other concerns expressed in its submission, the township stated that it did not believe that an application for a C of A for sewage works on the Brechin Industrial Park site was required, because the works were for the benefit of downstream agricultural land users. Following a brief meeting between MOE, the township and Lafarge representatives, just prior to the scheduled ERT hearing, the appellants withdrew their appeals, and agreed to provide MOE with the required technical assessments and applications for approvals for the sewage works in the upper watershed.

As of April 2005, MOE's Environmental Assessment and Approvals Branch was reviewing the township's applications for Cs of A for both the Lafarge and Brechin Industrial Park SWM facilities and associated drainage. MOE has suggested that the township may want to consider an enlarged SWM facility that meets the needs of both the township's industrial park and the Lafarge properties. Until *OWRA* approvals are received from MOE, the Township of Ramara cannot pass its by-law formalizing the existence of the McNabb Municipal Drain and allocating *Drainage Act* assessments to the riparian landowners.

ECO Comment

The MOE summary report to the applicants was clear, comprehensive and specifically addressed each of the four time periods of drainage changes described in the application for investigation. The investigation was completed approximately within the time period specified under s. 74 of the *EBR*. The ECO is pleased with the response of MOE and to our knowledge, MOE's use of the *OWRA* to regulate an agricultural drainage scheme is unprecedented. Given the complex nature and history of drainage in the McNabb Drain watershed, MOE's decision to order a report and further assessment was appropriate. MOE could have gone further, requiring the township to initiate a Class EA in connection with its industrial park drainage works.

Drainage changes that were carried out in the 1970s and 1980s without required statutory approvals resulted, by 1998, in an unstable and dysfunctional drainage system in the McNabb Drain watershed. In 1998, the problems became very pronounced and allegedly damaged property and enjoyment of downstream landowners. Since then, these landowners have invested large amounts of time and money on proceedings, meetings, correspondence, consultants' studies etc. During this time, ongoing erosion of stream channels and banks has occurred, and large sediment and nutrient loads have been flushed downstream to Lake Simcoe.

It is noteworthy that Lake Simcoe is under an Environmental Management Strategy the goal of which is to improve and protect the health of the Lake Simcoe watershed ecosystem; MOE, MNR, MAH and the CA are all parties to the Strategy. Despite this broad environmental goal and other more local wetland and fisheries concerns related to the drain, attempts in 1998 and 1999 by the downstream property owners to elicit support and action from some of these government agencies were not met with any meaningful response.

When zoning and drainage changes were being implemented in connection with a shift to industrial land uses, the municipality should have developed a stormwater management plan, and obtained appropriate approvals from MOE as required under the *OWRA*. Up until the Drainage Referee became involved in 2000, changes to the drainage system made or financially supported by the township appear to have largely been carried out without any statutory authority, and there is some question as to whether there was statutory authority for work done subsequently. In May 2001, the township received the report of the Drainage Engineer, but as of April 2005, the township has still not passed the by-law authorizing its implementation.

The *Drainage Act* has provided a convenient mechanism for smaller municipalities in particular, to develop drainage, erosion control and stormwater management schemes, not just for agricultural areas, but for areas which are undergoing early stages of development and being taken out of agricultural land use. With Ontario's burgeoning population, this misuse of the *Drainage Act* had engendered frequent stakeholder battles and conflicts with environmental regulations in the early 1990s and may have precipitated the 1997 amendment to clarify wording concerning *OWRA* s. 53 approvals requirements and the *Drainage Act* exception. There is still some ambiguity in the exception under *OWRA* that states: "(6) This section does not apply… (d) to a drainage works under the *Drainage Act* or a sewage works where the main purpose of the works is to drain land for the purpose of agricultural activity." It is not clear, for example, how "main" is defined: if 20 per cent of a watershed is urbanized and 80 per cent of the downstream lands are agricultural, is the main purpose still to drain land for the purpose of agricultural activity?

The ECO believes that misuse of the *Drainage Act* in the land development process can have serious environmental consequences. Because projects approved under the *Drainage Act* are exempt from the *EAA* under Reg. 334, R.R.O. 1990, and are exempted from the *OWRA* as discussed in the foregoing, application of the *Drainage Act* process in such areas proceeds without proper stormwater management planning or implementation of best management practices. In areas undergoing the "hardening" process of paving and building and closing drainage into pipes, major changes in runoff intensity and volume occur which will have devastating impacts on downstream watercourses. The *Drainage Act* and earlier laws were originally developed to allow riparian landowners the means to obtain outlet for drainage, and to allocate benefits and expenses for instituting measures to achieve drainage on a cooperative basis.

Aside from the environmental consequences, misuse of the *Drainage Act* in developing areas can result in the unacceptable situation, as it has in the McNabb Drain, of downstream landowners being assessed costs for implementation of remedial measures to deal with flow changes resulting from upstream land use shifts that replace agricultural land uses with residential and industrial land uses.

The ECO believes that more resources should be committed to informing and educating staff of smaller municipalities on drainage planning issues. While there have been many high quality stormwater management courses/seminars/workshops, they have been more accessible to larger urban municipalities with more staff and funding, while the smaller, less well-funded municipalities struggle to gain access to modern stormwater management techniques, planning tools and policies. The Ministry of Agriculture and Food, the Ministry of Natural Resources (perhaps through Conservation Ontario) and the Ministry of the Environment could show leadership in this area and sponsor low cost workshops and publications designed to better inform and educate smaller municipalities on stormwater management. This would be particularly appropriate given the government's developing agenda on watershed based source protection.

Review of Application I2004003:
Alleged *Environmental Protection Act* Contravention by a Sauna Owner
(Investigation Undertaken by MOE)

Background/Summary of Issues

In April 2004, two residents of Ontario submitted an application for investigation which alleged that dense smoke from their neighbour's wood-heated sauna consistently blew off-site in large quantities onto their cottage property in contravention of s. 14 of the *Environmental Protection Act (EPA)*. The sauna was located within 40 feet of the applicants' property and at a lower elevation. According to the applicants, the sauna was used several times weekly, sometimes for 12-16 hours per day, and had been in use every weekend and holiday since 2002.

The applicants alleged that their neighbour was contravening s.14 of the *EPA* as the smoke had adverse impacts on their health, their ability to enjoy their property and their property value. Under s.14 of the *EPA*, "no person shall discharge a contaminant or cause or permit the discharge of a contaminant into the natural environment that causes or is likely to cause an adverse effect." Section 1 of the Act provides eight meanings for "adverse effect," including adverse human health effects, harm or material discomfort to people, injury or damage to property and loss of enjoyment of normal use of property.

The applicants stated that the sauna smoke caused members of their family to experience extreme nausea and headaches as well as nose and throat irritation. They also expressed anxiety about the heightened risk of serious and life-threatening impacts of exposure to members of their family who suffer from serious heart conditions and asthma. Doctors' notes were provided to certify medical conditions. In the past, the courts have ruled that medical evidence will strongly support claims of human health effects under s.14 of the *EPA*.

The applicants included evidence of the harmful nature of human exposure to woodsmoke. Drawing from Environment Canada's website, the application explained that woodsmoke comprises a mixture of potentially hazardous gases and particles of various sizes including nitrous oxides, carbon monoxide and various organic chemicals. Some particles are less than 10 microns in diameter, so small that they easily become lodged deep within lungs and can lead to serious respiratory problems. For this reason, particulate matter less than 10 microns in diameter has been listed as a toxic substance under the *Canadian Environmental Protection Act*.

The applicants also provided evidence that woodsmoke can cause eye, nose and throat irritation and headaches and can also "lead to a worsening of existing heart and respiratory conditions." An article published in the journal "Epidemiology" found that "in people with heart disease, very short-term exposures of one hour to elevated fine particle concentrations have been linked to irregular heart beats and heart attacks." Exposure to smoke can also trigger asthma attacks.

In a conversation with ECO staff in October 2003, the applicants advised the Eco that the sauna owners had agreed to pay to move the sauna, but that the applicants had not agreed to finance the sauna owner's purchase of their frontage property, including the site to which the sauna was proposed to be moved. In their submission, the applicants stated that the sauna smoke has not only impacted their health, it has reduced their ability to enjoy their property. They simply cannot sit outdoors while the sauna is in operation and the indoors does not provide relief in the summer. Due to the extreme discomfort experienced and their concerns about health risks, the applicants have been forced to leave their cottage earlier than planned. The applicants alleged, furthermore, that the sauna emissions have rendered their property valueless, as they would have to disclose the problem to any potential buyer.

According to the applicants, the neighbour understood their concerns about the sauna and had expressed plans to move the sauna to a higher elevation. The applicants remarked that such a move would have pleased them, as it would have caused the smoke to blow away from their property. Unfortunately, the neighbour did not follow through with these plans.

The applicants also noted that the Environmental Review Tribunal has recognized that smoke from wood stoves can cause significant problems, including health-related problems. They also provided documentation indicating that the Ministry of the Environment (MOE) had previously issued an order under the *EPA* requiring homeowners to address a situation involving off-site impacts of smoke released from an outdoor wood stove.

Ministry Response

MOE acknowledged receipt of the applicants' submission in May 2004. In October 2004, MOE advised the applicants by letter that the ministry was undertaking an investigation and that the ministry did not expect that it would complete the investigation until January 31, 2005.

On February 2, 2005, MOE provided the applicants with a report on the outcome of the investigation. The report indicated that the ministry's investigation consisted of "discussions and negotiations between the parties, site visits to verify the circumstances, an assessment of the applicability of the ministry's legislation and the potential environmental health impacts." The Ottawa District Office led the investigation with assistance from the ministry's Eastern Region Technical Support Section.

As a result of the investigation, MOE concluded that the sauna owners were in fact contravening s.14 of the *EPA*. According to the ministry, "facts exist to support the allegations made by the applicants that they are being directly exposed to, and are therefore being adversely impacted by, the smoke being emitted from the wood fired sauna." In particular, the ministry indicated that the applicants were suffering from the loss of enjoyment of normal use of property and material discomfort caused by smoke from the sauna.

MOE indicated that the ministry had required the sauna owners to prepare a plan outlining steps to be taken to "eliminate the adverse effects" resulting from the sauna's operation. The ministry provided the applicants with a contact name and number to assist them with any further questions.

In early February 2005, the sauna owner submitted a plan to MOE. The sauna owner proposed that the applicants notify the sauna owner when the applicants plan to go to their cottage so that the sauna owner can make sure that the sauna does not cause any adverse effects. MOE deemed this proposal to be unacceptable and requested that the sauna owner submit a new proposal by May 20, 2005. MOE suggested that the sauna owner consider other solutions, such as moving the sauna or using an alternative heat source. The sauna owner submitted a second proposed plan on May 27, in which they proposed to either move the sauna at a cost to the applicants or switch the heating source at a cost to the applicants.

MOE deemed the sauna owners' second plan to be inadequate. In late June 2005, the ministry issued the sauna owners a provincial officer's order (P.O.O.) under the *EPA*, requiring them to cease operation of the sauna until an adequate plan, as approved by the ministry, was put in place. Subsequently, the lawyer for the sauna owner requested a review of the P.O.O., which was conducted by MOE within the required 15-day period. Upon completion of the review, MOE indicated that the P.O.O. had been confirmed and on July 7, 2005, issued a Director's Order requiring compliance with it.

Other Information

On June 24, 2005, approximately two weeks after the Director's Order had been issued, the sauna owner appealed the order to the ERT. The sauna owner cited numerous grounds for the appeal including:

- MOE did not adequately consult with the sauna owners about the circumstances surrounding the emissions.
- MOE failed to give fair consideration to proposals made by the sauna owners.
- MOE failed to justify its compliance requests/orders by collecting and making available to the sauna owners adequate scientific evidence pertaining to the emissions and the impacts of the emissions.

The sauna owner also cast doubt on how much evidence demonstrating adverse impacts MOE had actually c collected.

ECO Comment

The ECO is pleased that the Ministry of the Environment (MOE) agreed to undertake an investigation into alleged adverse effects caused by smoke from the sauna. In the past, MOE has denied requests for investigation involving smoke from wood-burning stoves in residential areas, stating that it is not within its jurisdiction to respond to these kinds of complaints. MOE's Procedures for Responding to Pollution Incident Reports, 1997 states that municipalities are responsible for addressing issues associated with residential woodstoves. The ministry's handling of this case signals a new approach to compliance which is welcomed by the ECO.

Moreover, the ECO is pleased that, after determining that the sauna was causing adverse effects as defined by s.14 of the *EPA*, the ministry acknowledged that such impacts were occurring and asked the sauna owner to prepare and submit for approval a plan to address the impacts. The ECO believes that MOE's response to this situation constitutes an improvement over the ministry's response to similar situations in the past. In both our 2002/2003 and 2003/2004 annual reports, the ECO observed MOE's reluctance to identify s.14 *EPA* contraventions. However, in at least one instance in the past, MOE took even stronger measures. In 2000, MOE issued a Director's Order to homeowners requiring them to address off-site smoke emissions from woodstove burning due to the adverse impacts on human health the smoke was deemed to be causing.

The ministry provided useful contact information in its report on the investigation, but could have provided the applicants with further information regarding the ministry's requirements of the sauna owner, including timelines for submission, ministry review and approval, and implementation of the plan.

The ministry did not meet all of the technical requirements of the *EBR* in handling this application. The ministry should have given notice to the applicants of its need to extend the deadline by three months within 120 days of receiving the application, as per s.79 of the *EBR*. The ministry failed to do so, issuing a notification of the extension to the applicants almost one month late.

In a conversation with ECO staff in March 2005, MOE indicated that it expected the plan to be in place before the summer 2005 cottage season. However, as of early August 2005, there was no plan in place as the ministry's attempts at voluntary compliance were not successful and given the sauna owners' appeal of the orders to the ERT in July 2005. The ECO will continue to monitor the development of this case.

Review of Application I2004004: Alleged *EPA* and *OWRA* Contraventions at Orillia's Kitchener St. Landfill

(Investigation Denied by MOE)

Background/Summary of Issues

The Kitchener Street Landfill is a municipal landfill serving the City of Orillia. The site is located near Lake Simcoe and bounded by two waterways discharging into the lake. It has no leachate collection system and no liner, relying instead on an underlying layer of peat and adjacent buffer lands for landfill leachate attenuation. The site first received a C of A in 1971 and is currently approved to receive domestic, commercial and solid non-hazardous industrial waste.

The applicants allege that the City of Orillia has received waste contaminated with toxic substances at its Kitchener Street Landfill, in violation of the terms and conditions of the site's certificate of approval (C of A). They argue that this has contributed to the creation of contaminated leachate, which is subsequently being discharged from the site in contravention of s. 30 of the *Ontario Water Resources Act (OWRA)* and s. 14 of the *Environmental Protection Act (EPA)*. Section 30 of the *OWRA* prohibits the discharge of polluting materials into a waterway, while s. 14 of the *EPA* prohibits the discharge of a contaminant into the natural environment that causes or is likely to cause an adverse effect. In support of their allegations, the applicants refer to a 1992 Environmental Assessment Board hearing report which indicates that, at that point in time, groundwater within the boundaries of the landfill site was contaminated by landfill leachate and that exceedances of Provincial Water Quality Objectives were detected in groundwater found within the site and at site boundaries.

The landfill's C of A prohibits receipt of liquid industrial waste or hazardous waste at the site. The C of A also includes a condition requiring the formulation and implementation of a comprehensive plan for the receipt of contaminated material directed to the site by order of the Minister of the Environment. That plan was prepared by the municipality and approved by the MOE in 1992. It defines contaminated material as including "cleanup material from any spill which is reportable or which is reported under Part X of the *Environmental Protection Act* RSO 1990 or material which is registerable non-hazardous waste under Regulation 347 RRO 1990" and, further, that "only contaminated waste generated within the City of Orillia … can be received at the Landfill site." As the municipality's own record of waste receipt explains, the plan requires that "registerable non-hazardous waste must pass a Leachate Extraction Procedure Test," and "if it does not, it is considered hazardous waste and cannot be disposed of at the Waste Diversion Site."

In their request for investigation, the applicants raise concerns about the nature of the waste being accepted at the site through the above plan. They also contend that this provision allows the municipality to accept this contaminated material only if ordered by the Ministry of the Environment to do so – and that they have found no evidence that the minister has ever issued any such order to the municipality. Their application includes a copy of the municipality's records of contaminated material received at the landfill between 1988 and 2003. The applicants refer to this historical record of receipt of contaminated waste at the site as evidence that the municipality has been dumping waste containing toxic substances into the landfill in violation of the site's C of A.

The applicants also raise concerns about the municipality's approval of plans to dispose of 40,000 tonnes of soil contaminated with heavy metals, PCBs and other toxic substances at the site. This soil is from a brownfield site owned by the municipality and currently being redeveloped into a multi-use recreational facility (see the 2004/2005 annual report, page 94).

Finally, the applicants allege that the City of Orillia has violated conditions in the landfill C of A that require it to prepare a five-year area waste minimization plan and an accompanying strategy for implementation of that plan.

This application was accompanied by an application for review submitted by the same applicants. The ministry agreed to review all of the conditions of the Kitchener Street Landfill's C of A. This review will be completed in 2005 and the ECO will report on it in our next annual report.

Ministry Response

The ECO received this application on September 24, 2004, and forwarded it on to MOE. On November 23, 2004, MOE notified the applicants that it would not be conducting an investigation under the *EBR* process. MOE concluded that an investigation is not necessary at this time because two recent MOE landfill compliance inspections (carried out on March 25, 2003 and September 3, 2004), the annual landfill monitoring report and a recent assessment all showed that the Kitchener Street Landfill does not have any compliance issues with respect to its C of A, it continues to meet provincial standards, and it shows no off-site adverse effects.

In response to the allegations that the site is violating *OWRA* s. 30 and *EPA* s. 14, MOE indicated that no violations were observed during 2003 and 2004 compliance inspections undertaken by MOE abatement officers from the Barrie District Office. Further, MOE reviewed the annual landfill monitoring reports submitted by the municipality, and indicated that these reports confirm that the landfill site continues to satisfy the conditions of its C of A and is meeting the "reasonable use guidelines."

In reference to the comprehensive plan for the receipt of contaminated materials and the applicants' allegation that they could find no evidence of the minister ordering that such materials be accepted at the site, MOE indicated that it found no evidence that it had ever ordered any "toxic" or "hazardous" substances to be disposed of at the Kitchener Street Landfill site. Further, MOE explained that, while there are definitions for "hazardous", "severely toxic" and "leachate toxic" waste, there is no definition of "toxic" waste in Regulation 347. The response included the full text of these available definitions.

In response to concerns raised by the applicants regarding receipt of soil from the brownfield site destined to house the city's multi-use recreational facility, MOE reported that the municipality has confirmed that "only soils that conform to the conditions of the C of A and Regulation 347" will be moved from the brownfield site to the landfill.

In response to concerns raised about alleged contraventions of C of A requirements to prepare waste diversion and management plans, MOE confirmed that these plans were prepared as required and, therefore, these conditions have been satisfied.

ECO Comment

The ECO believes that MOE's decision not to undertake an investigation is reasonable. The C of A for the Kitchener Street Landfill permits the disposal of solid non-hazardous industrial waste at the site and, through provisions in the comprehensive plan for the receipt of contaminated materials, also allows contaminated materials – including cleanup material from any spill reportable under Part X of the *EPA* or material which is registerable non-hazardous waste under Regulation 347 – to be disposed of at the site. The requirements are in place to limit disposal to materials that, while they may contain contaminants, must be shown to be non-hazardous as per the provisions of Regulation 347. However, this is not to say that the ECO believes that the current practices approved through the landfill C of A are providing for proper protection of the environment.

Further, the ECO believes MOE's response to this application would have benefited tremendously from more detailed explanations and some critical clarifications. MOE's response was lacking in detail and failed to adequately and clearly respond to the concerns raised by the applicants.

As noted above, MOE has decided to undertake a full review of the Kitchener Street Landfill's C of A in response to an application for review under the *EBR* submitted at the same time as the application for investigation. The ECO is pleased that this decision has been made as it will provide MOE with the opportunity to consider whether current landfill practices, as approved in the C of A, are suitably protective of the environment. It would have been helpful for MOE to mention that it was reviewing the landfill's C of A, partly in response to the *EBR* application. This would have been particularly appropriate given that MOE's main reason for undertaking the review is its concern over an increasing trend in the concentration of landfill contaminants in groundwater and surface water. Concern over landfill contaminants in groundwater and surface water was a central issue raised in this application for investigation.

An example of lack of detail and failure to effectively address concerns raised is the manner in which MOE responded to the allegation that "toxic" waste was being deposited at the Kitchener Street Landfill. The MOE response was that "toxic" waste is not defined in any provincial Act or regulation and, while definitions of "hazardous" waste and "leachate toxic" waste were provided in its response, what MOE really needed to do was provide a clear explanation of "contaminated" versus "hazardous" waste as defined in provincial regulations. Further, an explanation of the testing procedures used under Regulation 347 (e.g., the Toxicity Characteristic Leachate Procedure) for determining whether waste should be categorized as "contaminated" or "hazardous" would have been useful in this situation.

In responding to allegations that the landfill site operator is contravening the *OWRA* s. 30 and *EPA* s. 14, MOE made reference, among other things, to the fact that two compliance inspections were undertaken at the site. It would have been very helpful had MOE provided more detail regarding what those inspections entailed. For instance, did the compliance inspections simply involve visual observations of the site on the day of inspection or were samples taken and other methods used by the MOE abatement officer to ensure that the landfill was in compliance with all requirements?

The response also would have benefited from a detailed explanation of how the landfill site's "comprehensive plan for the receipt of contaminated materials" actually works. The C of A condition requiring that this plan be developed and implemented indicates that "contaminated" material can be received at the site "by order of the Minister of the Environment." The applicants indicated that they found no evidence of any such orders ever being issued by the minister. MOE, rather than clarifying the process for approving the disposal of contaminated wastes, responded by indicating that it has never ordered "toxic" or "hazardous" waste to be deposited at the site. However, a process is clearly in place that allows for contaminated materials to be deposited at the Kitchener Street landfill, given that such waste is currently being accepted at the site. Clarification of the protocol followed by MOE, in conjunction with the municipality, to approve the disposal of contaminated materials at the site under the plan would have been very helpful information to include in the response to applicants. In addition, an explanation of why this practice is in place at this landfill, including a description of *EPA* Part X Spills Provisions, would also have been appropriate.

Review of Application I2004005: Alleged Contraventions of the Certificate of Approval for Sewage Works for King City (Investigation Denied by MOE)

Background/Summary of Issues

In October 2004, two applicants filed an application for investigation of alleged contraventions of the "Certificate of Approval #3107-5ZSKK3 for Sewage Works" ("the C of A") issued to the Regional Municipality of York for the King City Regional Sewage Pumping Station. This C of A grants approval for the construction of a sewage pipe, nicknamed the "Big Pipe," from King City, a village north of Toronto, to the York-Durham Sewer System (YDSS). The YDSS is a 100-kilometre network of pipes that transports sewage from the Regions of York and Durham to a treatment plant in the City of Pickering. When construction finishes, residents and businesses in King City will be connected to the Big Pipe and approximately 1500 septic systems will be decommissioned. For additional background information on YDSS, this C of A and the application for review that the applicants filed for this C of A, refer to pages 254-258 of this Supplement.

The applicants alleged that issuance of the C of A violates s. 33(c) of the *Ontario Water Resources Act* (*OWRA*) which states that "an area may be defined by a Director that includes a source of public water supply … (c) wherein no act shall be done and no water shall be taken that may unduly diminish the amount of water available in such area as a public water supply." The applicants alleged that the amount of water available will be diminished since:

- "There will be no recharge with clean filtered septic effluent." The applicants contend that water, i.e., septic effluent, from the septic systems will no longer recharge the aquifer or contribute to the baseflow of the Humber River. Instead, this water, in the form of sewage, will be piped to a treatment plant in Pickering.
- "Groundwater will be removed by infiltration into the YDSS sewage pipes." According to the applicants, groundwater will infiltrate into the Big Pipe resulting in a loss of groundwater in the area.
- "Additional water from the aquifer will be added to the oversized YDSS pipes to move the sewage until the anticipated development arrives." At a population level of 5,000, there will not be sufficient flow in the Big Pipe to prevent solids from being deposited along the walls of the pipe. Therefore, water will be added to the Big Pipe to ensure that there is sufficient flow and to facilitate maintenance and cleaning until the population of King City grows to 12,000.

As part of their application, the applicants calculated the amount of water that the Big Pipe will divert from groundwater and the aquifer, and concluded that, if 5,000 people are connected to the Big Pipe, the amount of water entering the aquifer through natural recharge is 10 million cubic metres per year more than the amount being taken as drinking water. In contrast, septic systems allow water taken from the aquifer to be returned to the aquifer resulting in 280 million cubic metres per year more water entering the aquifer than being taken. If the population of King City grows to 12,000 people as planned, the Big Pipe will divert significantly more water from the groundwater and the aquifer, and will result in 960 million cubic metres per year net loss of water from the aquifer. The applicants concluded that the effect on the water supply of the existing scenario of 5,000 residents on septic systems is sustainable and of 5,000 residents connected to the Big Pipe may be a break-even point; whereas 12,000 residents connected to the Big Pipe is not sustainable.

The applicants further explained that "no reasonable person, having regard to relevant laws and to any government policies developed to guide decisions of that kind" would deny that the aquifer from which King City residents draw their water is a public water supply citing language contained in s. 41(a) of the *EBR* related to leave to appeal applications for instruments. As evidence, they noted that, according to the Annual Water Production Summary for King City, municipal wells withdrew approximately 560 million cubic metres in 2002. In addition, there are private residential wells, farms and businesses that are withdrawing water from the aquifer. Therefore, the applicants alleged that the C of A contravenes s. 33(c) of the *OWRA*.

The applicants also alleged that the Big Pipe will divert water from the East Humber River resulting in a baseflow reduction of 20 per cent at the current population level of 5,000 and 35 per cent at the projected population level of 12,000. The applicants are concerned that the Big Pipe will affect the flora and fauna of the Oak Ridges Moraine and agriculture, and are worried that depletion of the water supply will impact future generations.

The applicants noted that there were alternative approaches to the Big Pipe that would not deplete the local aquifer.

Ministry Response
In its response, MOE advised the applicants that it was denying their application on the basis that the area in question has not been designated by an MOE Director, under s. 33(1) of the *OWRA*, as an area for protection of public water supply. Under s. 33(2), any water taking that may unduly diminish the amount of water available in the area of the public water supply would be prohibited. However, since no area has been designated under s. 33(1), there is no contravention of s. 33 of the *OWRA*. MOE did not respond to the allegation that the Big Pipe will diminish the amount of water available in the area of the public water supply.

ECO Comment
The ECO agrees with MOE that there is no alleged contravention of s. 33 of the *OWRA*. However, the ECO is disappointed that the response did not address the real issue that the applicants raised, that is, the concern that the Big Pipe will unduly diminish the amount of ground water available for local residents, businesses and ecosystem functions. Under s. 77(1) of the *EBR*, a minister may decline an application for investigation if the application is frivolous or vexatious, or if the alleged contravention is not serious or is unlikely to cause harm to the environment. MOE failed to confirm or deny the accuracy of the applicants' conclusions that the Big Pipe would harm the environment and unduly diminish the amount of water available in the area of the public water supply. In addition, MOE was a month late with its response to the applicants. The ECO would have preferred if MOE had formally notified the applicants and the ECO of the delay in early January 2005.

Since this application dealt specifically with drinking water supplies, it would also have been helpful if MOE had advised the applicants that York Region and King City have commenced work on a Class EA for drinking water infrastructure to service the community and that the public will be consulted as part of this process.

Review of Application I2004006:
Alleged Contravention of Provisional C of A by Sheldrick Sanitation Ltd.
(Investigation Denied by MOE)

Background/Summary of Issues
The applicants requested that MOE investigate alleged contraventions of a certificate of approval (C of A) for the use and operation of a waste disposal site (transfer and processing station) in Smithville, by Sheldrick Sanitation Limited. Sheldrick currently operates under a Provisional C of A No. A650112 issued in 1996 (and amended October 25, 1999) which permits the facility to receive, process, temporarily store and transfer 300 tonnes of municipal and non-hazardous solid industrial waste per day.

The applicants allege that Sheldrick Sanitation contravened the following laws administered by MOE:

1. Section 14 of the *Environmental Protection Act (EPA)* by emitting odours causing an adverse effect. The applicants state they have experienced adverse effects related to foul garbage odours observed on numerous occasions on properties located near the waste transfer station. Section 14 of the *EPA* states that "Despite any other provision of this Act or the regulations, no person shall discharge a contaminant or cause or permit the discharge of a contaminant into the natural environment that causes or is likely to cause an adverse effect." Under the *EPA*, the definition of "adverse effect" includes loss of enjoyment of normal use of property and interference with the normal conduct of business.

2. Section 27 of the *EPA* because Sheldrick has extended its waste disposal site without approval of MOE. Specifically, the applicants alleged that the operator had been using waste bins on the property of another company to store waste that was destined to be handled by Sheldrick at its processing and transfer site.

Section 27 of the *EPA* states that no person shall use, operate, or establish a waste disposal site "unless a C of A has been issued by the Director and except in accordance with any conditions set out in such certificate."

3. Subsections 184 (2) & (3) of the *EPA* because the operator submitted false and misleading information to the Environmental Assessment and Approvals Branch (EAAB) when it applied for amendments to its C of A in 1996 and 1998. Subsection 184(2) states that no person shall submit false information to the ministry in respect of any matter related to the Act or its regulations. Subsection 184(3) prohibits the submission of false information to the ministry in any document or data required to be created to comply with the Act or its regulations.

4. Section 34 of the *Environmental Assessment Act (EAA)* because the operator submitted false information when it supplied information to MOE related to its designation as a private project subject to the *EAA*. This designation was made by O. Reg. 398/01 passed under the *EAA* in the fall of 2001. Section 34 of the *EAA* prohibits any person from knowingly supplying false information in any application made to MOE or in information supplied to ministry staff or a tribunal conducting a hearing under the Act.

The applicants also outlined concerns about the need for a requirement for an outdoor containment system, alleging that discharges from the site were being deposited in the sanitary sewers operated by the local municipality.

The application also raised concerns about the risk of fire and explosion at the transfer station. Moreover, the applicants contend that, due to proximity to a school and residential subdivision, MOE must impose higher standards on the site operator than would normally be required under applicable laws and policies.

The application was submitted in November 2004, and included copies of letters written to local residents between 2001 and 2003 by MOE and other provincial and municipal officials, partly responding to complaints filed and concerns raised by local residents. Most of these letters had previously been sent to the local office of the Ministry of the Environment between 2001 and 2003.

The November 2004 application for investigation was accompanied by a separate application for review by the same applicants. The ministry accepted this review in early 2005; however, the scope of the review is restricted to conditions in the C of A related to the Odour Control Plan for the site (see page 259 of this Supplement). The ECO plans to review MOE's handling of this application in a future ECO annual report Supplement.

Background on the Site and Previous EBR Applications

This waste transfer station is located at a site that is zoned industrial, and shares the area with other light industrial uses. Prior to 1996, J. W. Sheldrick, a local businessman, operated a family-owned business that provided both milk delivery and garbage pickup for Smithville residents. The land now used for the transfer station was used to store trucks and vehicles at night and on the weekends when they were not being used for deliveries or pickups.

In 1996, Sheldrick filed an application for use and operation of a transfer and processing station on one hectare of land. According to Sheldrick's application, the site was intended to handle solid non-hazardous and blue box wastes. MOE posted a proposal notice on the Environmental Registry in April 1996, including a single 26-word sentence to describe the project. No comments were submitted on the proposal and the facility was constructed in 1997. MOE posted its decision notice related to the approval in November 1997, more than 18 months after Sheldrick's application. During this period Mr. Sheldrick also sold the waste management part of his company to Modern Corporation, a large company based in Western New York State (and arranged to allow Modern to continue using the title of his company and the goodwill associated with it). Modern Corporation promptly secured contracts to collect waste from areas in Hamilton and process them at the Sheldrick transfer station.

In early 1998, Sheldrick applied to MOE for an amendment to the C of A for the site to: 1) allow the operator to accept and process greater quantities of industrial, commercial and institutional (IC&I) waste and reduce the quantities of blue box recyclable wastes processed at the site; and 2) allow for the handling of white goods and wood waste at the site. The company proposed to start the new operation in May 1998. MOE did not post a Registry proposal notice about Sheldrick's requested amendment and granted the amendment to its C of A in October 1999. The applicants allege that MOE's decision to approve this change in the nature of the wastes handled by Sheldrick (i.e., from dry recyclables generated by households to IC&I wastes containing an increased range and amount of compostable and wet wastes) partially explains why odour problems have increased in the past five years. Between 1998 and 2000 when the facility primarily was accepting dry recyclables, there were a total of two odour complaints recorded by the ministry. Complaints increased in each of the following years, peaking at 60 in 2003. The number of complaints recorded by the ministry in 2004 was 20, and may indicate some operating improvements at the facility in 2004.

In 2000, the transfer station announced plans to expand its waste processing facility, and, as noted above, its expansion proposal was designated under the *EAA* in 2001. According to MOE, Sheldrick has proposed to:

- Increase the amount of waste received from 300 to 900 tonnes per day;
- Increase the storage volume to 1350 tonnes;
- Increase the outbound volume of waste to 1350 tonnes per day;
- Increase the storage time for curbside municipal waste to one week and other waste to 90 days;
- Accept asbestos waste;
- Accept all municipal solid waste;
- Remove service area restrictions; and
- Adjust the receiving hours and the activity hours.

To meet the requirements of the *EAA*, the company is preparing Terms of Reference for the planned expansion. There is significant public concern about the proposed expansion, and MOE notes that complaints about odours have increased substantially since the expansion plans were announced in 2000.

Concerned residents submitted three previous *EBR* applications about this facility (two in 2001 and one in October 2003), and MOE denied all three applications. A brief summary of these applications follows below:

The first was an application for review of the certificate of approval (R2001013) for the Sheldrick Sanitation waste transfer/processing facility, which was reviewed in the Supplement for the ECO 2001/2002 annual report (p. 253) and is summarized below. This request was submitted because the applicants believed the existing C of A had inadequate safeguards for storm water collection, odour control, dust and vector control, landscaping or financial assurance. The ministry denied the application but conducted a partial review of the C of A based on the issued raised by the applicants.

The Supplement to our 2002/2003 annual report (p. 195) outlined a second application for review (R2001017) requesting new waste management regulations under the *EPA*. This request was submitted because the applicants believed that the Sheldrick Sanitation facility was inappropriately sited in a light industrial area, adjacent to a school and residential area. The applicants also had concerns about traffic impacts and the adequacy of MOE's monitoring and enforcement.

The Supplement to our 2003/2004 annual report (p. 327) outlined an October 2003 request that MOE investigate alleged contraventions by Sheldrick Sanitation of its C of A. This third application is similar to the investigation application under review here. However, the November 2004 applications for investigation and review contain new information not previously supplied to the ECO or to MOE as part of an earlier *EBR* application.

In response to the October 2003 application for investigation, the ministry noted that its abatement staff had conducted a large number of site visits in 2002 and 2003, and had also issued a Provincial Officer's Order to the company in November 2003. The Order required the company to produce and implement an odour abatement plan by March 31, 2004.

As noted in our 2003/2004 annual report Supplement, MOE's decision on the October 2003 application was supported by a Provincial Officer's Report, dated November 5, 2003. This report provided a detailed description of an MOE site visit on July 15, 2003. The MOE Provincial Officer concluded from his site visit that on the day in question, odours from Sheldrick were causing the company to contravene the *EPA*, s. 14, by adversely impacting off-site property owners. The report also documented that shortly after this November 5, 2003 site visit, Sheldrick proposed to voluntarily undertake an odour assessment. When the company failed to adequately follow through on this commitment, despite frequent reminders from MOE staff in the late summer of 2003, MOE decided to issue a Provincial Officer's Order in November 2003.

The November 2003 Provincial Officer's Report also noted that the company had taken a number of steps to control odour, including:

- Purchase and installation of new deodorizing equipment in the building;
- Purchase of a deodorizing truck with positive pressure spray;
- Purchase of a new truck for removing IC&I waste as soon as possible;
- Establishment of an odour control program;
- Establishment of an odour complaints procedure; and
- A new rule that north and south overhead doors of the facility not be opened simultaneously.

Ministry Response

MOE denied this request for an investigation on February 9, 2005, on the grounds that it would be redundant. In its response the ministry described the site history and provided a detailed response to most of the alleged contraventions outlined by the applicants.

With respect to the alleged contraventions of s. 14 of the *EPA*, MOE stated that the alleged violation was not "serious enough to warrant an investigation due to insufficient evidence." The ministry noted that the current C of A "in no way abrogates Sheldrick's legal obligations to take all reasonable steps to avoid violating the provisions of all applicable legislation and regulation," including the provisions of s. 14 of the *EPA*. MOE went on to note that it "will look at odour concerns through a review of conditions 14 and 18 which relate to odour control and will codify the intent and operation procedures of the Odour Control Plan prepared by Sheldrick." The ministry also acknowledged that it had received nine separate odour complaints during a 14-day period following the publication of an article in the Hamilton Spectator in August 2004, but was unable to substantiate any of them.

MOE stated that it investigated the alleged contravention of s. 27 of the *EPA*, that the operator has extended a waste disposal site without MOE approval, "to the extent the ministry considers necessary." MOE noted that the applicants had previously alleged that Sheldrick had been using waste bins on the property of another company to store waste, and it had investigated in November 2002. No further action was taken. MOE concluded after its 2002 investigation that none of the bins were leaking or posed an environmental concern. The ministry went on to note that the C of A for the waste transfer and processing site indicates that it is to be used for receipt, processing and temporary storage of non-hazardous solid industrial waste, and the storage of empty bins at another location does not represent an expansion of Sheldrick's transfer station.

With respect to the alleged contraventions of s. 186 of the *EPA*, MOE again observed that the alleged violation was not "serious enough to warrant an investigation." The ministry repeated its argument noted above that the current C of A "in no way abrogates Sheldrick's legal obligations to take all reasonable steps to avoid violating the provisions of all applicable legislation and regulations." MOE also went on to note that the operator must comply with all the requirements of Regulation 347, R.R.O. 1990, the General Waste Management Regulation under the *EPA*.

With respect to the alleged contraventions of the *EAA*, MOE stated that "an assessment of the application found that failure to investigate the alleged contravention of s. 34 of the *EAA* is not likely to cause harm to the environment." The ministry went on to point out that pursuant to O. Reg. 398/01 Sheldrick is required to prepare an individual environmental assessment before it can expand the site, and that this "is the most extensive review process possible" under the *EAA*.

MOE responded to the applicants' concerns about the need for a requirement for an outdoor containment system by pointing out that existing conditions in the C of A are in place to address concerns with potential wash waters, leachate and storm water run-off discharges from the site. Condition 21 stipulates that all discharges from the site including storm water run-off shall be managed according to municipal, provincial and/or federal legislation and by-laws. They also noted that no "substantiated complaints related to off-site discharges" have been recorded by local MOE abatement staff.

With respect to the applicants' concerns about the risk of fire and explosion at the transfer station, MOE noted that condition 16 of the C of A states that the company shall ensure that all wastes including wood waste, are stored in accordance with the *Fire Protection and Prevention Act*, S.O. 1997 and the Ontario Fire Code.

MOE also stated that the zoning issues raised by the application "are more appropriately dealt with through the municipal planning process and/or the environmental assessment process." MOE made enquiries to the local municipality and was informed that the "site met zoning criteria for the municipality."

ECO Comment

The ministry's response to this application was reasonable. The applicants detailed a number of problems and alleged contraventions they have observed related to the operation of the Sheldrick waste transfer and processing site. MOE did respond to most of the concerns and the alleged contraventions the applicants raised, and explained what has been done in the past to deal with the problems. Furthermore, MOE did provide a person to contact and a phone number, should the applicants require more information.

While MOE did respond by detailing the complaints it has received about the site, the ministry implied that it is generally satisfied Sheldrick is complying with its C of A, and that adequate follow-up occurs when complaints are made and when site operators are advised or directed by MOE to follow a course of action.

The applicants believe that they are experiencing a loss of enjoyment of property because of adverse effects from Sheldrick's operations. As noted by the ECO in the Supplement to our 2003/2004 annual report, it appears that the applicants in this case have a valid concern about odours from the transfer station causing adverse effects. Indeed, MOE staff agreed with this conclusion after a site visit in July 2003, and issued an Order to deal with odours emanating from the site in November 2003.

Despite this, MOE did not tell the applicants or the ECO if they had made a determination as to whether the problems outlined by the applicants constituted adverse effects under the *EPA*, or if the allegation of the loss of enjoyment of property can be substantiated. Nevertheless, the fact that MOE has accepted the November 2004 application for review filed by the applicants, with the investigation application under review here, suggests that MOE wants to ensure that operating practices are improved at the site and the odour problems will be addressed.

The applicants also outlined concerns about the need for a requirement for an outdoor containment system, alleging that discharges from the site were being deposited in the sanitary sewers operated by the local municipality and risks that might be posed by explosions and fires at the site. MOE's responses to these problems were reasonable.

The ECO notes that MOE did not fully address all of the concerns and allegations of the applicants. With respect to the alleged contraventions of s. 184 of the *EPA* and s. 34 of the *EAA*, MOE stated that "an assessment of the application found that failure to investigate the alleged contraventions would not likely cause harm to the environment." However, the ministry failed to fully explain the nature of its assessment of the alleged contraventions. Moreover, in respect of the alleged *EAA* contravention, MOE also failed to note that an investigation would have produced minimal results in terms of enforcement action because the limitation period for prosecuting alleged contraventions of the *EAA* is 6 months as provided by the *Provincial Offences Act* (*POA*). This once again highlights the ECO's concern that the *EAA* should be amended to provide a two-year limitation period.

As noted above, the November 2004 application for investigation was accompanied by a separate application for review by the same applicants. The ministry accepted this review in early 2005 and the ECO plans to review MOE's handling of this application in a future ECO annual report Supplement.

The ECO also notes that in the spring of 2005 MOE posted a new Registry policy proposal on its odour management polices and standards. The ECO also plans to review this new policy in a future ECO annual report or Supplement.

Review of Application I2004007:
Alleged Contravention under the *EPA*: Installation and Operation of Wind Turbine
(Investigation Denied by MOE)

Background/Summary of Issues

In January 2005, the ECO received an application raising concerns about a residential wind turbine. The applicants alleged that neighbouring landowners installed and had been operating a wind turbine without proper approvals resulting in an "illegal discharge of noise and strobe lighting." The applicants felt that the operation of the wind turbine should have required a certificate of approval (C of A) under section 9 of the *Environmental Protection Act* (*EPA*) and that it is resulting in the applicants' loss of enjoyment of their property in contravention of section 14 of the *EPA*.

The applicants went on to detail how the operation of the wind turbine has affected their lives and property. The applicants wrote that the turbine's noise and light impacts have caused stress, have interfered with animal husbandry and recreational horse riding, and have diminished the value of their property. Furthermore they noted that occasionally large ice shards (some exceeding 12 centimetres) were thrown from the blades of the wind turbine onto a public road. The *EBR* application for investigation was one of several means by which the applicants tried to draw the attention of provincial or municipal officials to their concerns.

Detailed Background

The applicants indicated that they became aware of the fact that their neighbours were considering the construction of a wind turbine on their property for electricity generation purposes some time prior to April 2004. They claimed that the wind turbine was erected around April 15, 2004, and went into operation on April 30, 2004. The applicants estimated that the wind turbine has 31-foot diameter blades situated on a 120-

foot tower founded in a concrete base and believe it to be the largest residential wind turbine available on the market at that time. The applicants added that the owners of the wind turbine own approximately 110 acres of land, but have chosen to locate the wind turbine within 75 feet of a traveled public road and in close proximity to existing residences.

Around the time of the turbine installation and for months thereafter, the applicants investigated various planning and environmental processes because of their concerns about the impacts of this structure. They reviewed their local township's Official Plan and relevant zoning by-law, Comprehensive Zoning By-law 1001-73, (the "by-law") but reported that they found it unhelpful for the purposes of addressing the siting of wind turbines. For example the by-law used the term "windmill", as opposed to wind turbine, which the applicants regarded as an outdated term and reference. They took this view in part because the by-law was enacted in 1973. Furthermore the applicants noted that a "windmill" is not a defined use in the Official Plan, nor are "windmills" or "wind turbines" recognized as permitted uses.

The applicants reported that the by-law permits a height exception for an accessory "windmill" to an otherwise permitted use (e.g., a dwelling). The applicants stated that they felt that the township inappropriately applied this height exception to the wind turbine. The applicants noted that the township did not require any corrective or remedial action (i.e., conditions attached to approval of the development). The applicants communicated these concerns to the township.

The applicants also communicated their concerns to the Ministry of the Environment, the Ministry of Municipal Affairs and Housing, as well as directly to the wind turbine owners. In autumn 2004, the applicants wrote letters to MOE explaining that the wind turbine was causing them loss of enjoyment of their property because of its noise and aesthetic impacts. The applicants also asked in one of the letters about the need for a certificate of approval (Air) for the wind turbine under s. 9 of the *EPA*. To address the query and the complaints, MOE carried out a site visit to verify circumstances and responded with a letter to the applicants on October 12 and 29, 2004. In the latter letter, MOE concluded that the wind turbine was exempt from *EPA* s. 9 requirements because of the exemption provided under Ontario Regulation 524/98. MOE provided the language of the regulation in its letter:

> "Subsection 9 (1) of the act does not apply to:
>
> 1. Any equipment, apparatus, mechanism or thing, other than a waste incinerator, that,
> i. is associated with a dwelling in a building or structure that contains one or more dwellings, and
> ii. is used by the occupants of not more than three dwellings in the building."

MOE stated that the wind turbine is further exempt under clause 9 (3)(c) of the *Environmental Protection Act* which states:

> "Subsection (1) does not apply to,
> (c) any equipment, apparatus, mechanism or thing in or used in connection with a building or structure designed for the housing of not more than three families where the only contaminant produced by such equipment, apparatus, mechanism or thing is sound or vibration."

Subsequently, legal counsel for the applicants wrote to MOE (letter of November 16, 2004) to object to the application of the Ontario Regulation 524/98 exemption to the wind turbine based on their knowledge that their neighbour's home was also a place of occupation (e.g., used for teaching yoga on a paid basis).

Ministry staff responded in a letter dated December 6, 2004, confirming the opinion set out in its October 29, 2004 letter that O. Reg. 524/98 exempts the owners from having to obtain a s. 9 *EPA* approval. MOE noted that ministry staff confirmed with the municipal building and by-law enforcement officer that the rural residential zoning allowed for the auxiliary home occupations. Ministry staff also visited the site and confirmed that the auxiliary home occupations were minor in nature. MOE advised the applicants to pursue these matters with the local municipality as issues about alleged adverse impacts from the operation of the wind turbine are best dealt with at the local municipal level through the implementation and enforcement of the appropriate by-laws and site planning processes.

In response, according to MOE, legal counsel for the applicants wrote to the ministry on December 17, 2004, disputing the ministry's interpretations and application of the exemptions provided under Ontario Regulation 524/98 and further requested that the ministry investigate the applicants' loss of enjoyment of their property as a contravention of Section 14 of the *EPA*. Furthermore, in late December 2004 and early January 2005 the applicants contacted the ministry, by telephone and in writing, indicating that on several occasions shards of ice were being discharged off the blades of the wind turbine and landing on or near their property causing further loss of enjoyment of their property and a potential health and safety risk. The applicants also contended that the discharge of the ice shards should be considered as a discharge of a contaminant as defined in s. 14 of the *EPA*.

MOE reported that on January 17, 2005 ministry staff conducted site visits at the residence where the wind turbine is located and determined that the home consisted of one residential dwelling. MOE staff reported that the residents have established home occupations consisting of cooking classes and a wine cellar in addition to providing yoga classes. These home occupations appeared to be relatively minor in nature, MOE reported.

On January 18, 2005, legal counsel acting on behalf of the applicants wrote to the Environmental Commissioner of Ontario to initiate an *EBR* application for investigation based on alleged contraventions of sections 9 and 14 of the *EPA*. The applicants noted that when the wind turbine became operational in late April 2004 it started generating nuisance noise, shadow flicker, strobe effect and the glinting of sunlight radiation. Also, winter conditions have caused ice formation on the wind turbine and its blades have released this ice onto the public road and the applicants' property. The applicants kept a descriptive, daily log of the effects of the wind turbine once operating and submitted it with their application. In the log they used terms like the turbine sounded "like a motor" and "revving up and down." The log includes numbers such as 40-70 and 50-70-80 (apparently to refer to the noise measures, in decibels, they took with a noise meter). There are also references to the time and effect of light reflection in the log. The applicants claimed that the observable environmental impacts (health, safety, ice and air emission issues) were not examined either through a detailed land use planning or environmental process.

Ministry Response
MOE found that the wind turbine does not require a C of A (Air) under s. 9 of the *EPA* because of the exemptions in O. Reg. 524/98 and clause 9 (3)(c) of the *EPA*, and that the allegations concerning s. 14 of the *EPA* do not warrant an investigation by the ministry. The local municipality issued a building permit and approved the construction of the wind turbine. The authority and tools to resolve issues such as noise, aesthetic impacts and the discharge of ice shards from the residential wind turbine, according to MOE, rests with the local municipality through the implementation and enforcement of the appropriate by-laws and site planning processes. The ministry's position was, and remains, that these types of issues and their resolution are best dealt with by the local municipality.

ECO Comment
MOE responded to the initial complaints raised by the applicants about their neighbours' wind turbine in the period before they filed the application for investigation. MOE did so by correspondence and even visited the

site. The ministry provided the applicants with its rationale for why the wind turbine did not require a certificate of approval, i.e., that it is exempted from section 9 of the *EPA* because of O. Reg. 524/98 Certificate of Approval Exemptions – Air and further by clause 9 (3)(c) of the *Environmental Protection Act* (a C of A requirement could have resulted in regulated noise limits being applied to the turbine).

The site visits by MOE staff did not uncover anything to change the ministry's interpretation that this turbine is exempt. Also, MOE found that the allegations concerning s. 14 of the *EPA* do not warrant an investigation by the ministry. As a consequence, MOE denied the application for investigation and provided the applicants with the background on how the ministry came to this conclusion. The ECO believes that MOE has come to a reasonable conclusion; under the current regulatory framework, a wind turbine of this scale and nature should not require a C of A.

Furthermore, MOE responded with the formal ministry position that these types of issues and their resolution are best dealt with by the local municipality. The ECO notes that there appears to be a fairly significant difference between the regulatory requirements and review processes for a project like a single residential turbine for domestic purposes as compared to a small industrial or commercial project (e.g., 1-3 wind turbines) in the same rural area. The latter would have to obtain a certificate of approval because of noise emissions and would likely need to address stakeholder concerns through a public consultation process. MOE could consider reviewing O. Reg. 524/98 to ensure that the types of exemptions it provides are appropriate since this regulation has been in effect for approximately seven years – a time in which interest in wind-generated electricity has increased significantly. By ensuring that wind energy projects are subject to appropriate regulatory treatment (which may include continuing certain exemptions) and that both residential and commercial wind energy proponents are treated fairly, MOE can help to ensure that the province meets its goal of 5 per cent renewable energy by 2007 and 10 per cent by 2010.

Similarly, the Ministry of Municipal Affairs and Housing (MAH) could play a role by reviewing the adequacy of land use planning for renewable energy projects in the province, since interest in wind power generation is expected to continue to grow in Ontario. The recently revised Provincial Planning Statement (2005) recognizes this by stating that alternative energy systems and renewable energy systems shall be permitted in settlement areas, rural areas and prime agricultural areas in accordance with provincial and federal requirements. MAH staff have already recognized more detailed provincial guidance on specific requirements related to certain operations such as wind turbines may be required in the future to prevent or at least minimize land use conflicts.

Review of Application I99008:
Alleged *OWRA*, *EPA* and *EAA* Contraventions by Snow Valley Ski Resort through Road and Sewage System Construction
(Investigation Undertaken by MOE)

Background/Summary of Issues

In April 1999, the ECO received an application for investigation from two Minesing residents who were concerned with road construction and sewage disposal system installation at the nearby Snow Valley Ski Resort, north of Barrie. In particular, the applicants alleged that the Snow Valley Ski Resort and its owner contravened the *Environmental Assessment Act* (*EAA*), the *Environmental Protection Act* (*EPA*) and the *Ontario Water Resources Act* (*OWRA*) in the following ways:

- Failure to undertake a required Schedule C Environmental Assessment under the Class Environmental Assessment for Municipal Roads (June 1993) prior to construction of a road in a Class I wetland, in alleged contravention of the *EAA* and Regulations 334 and 345, R.R.O. 1990 under the *EAA*;

- Failure to register on title an easement established by the Simcoe County District Health Unit (SCDHU), in alleged contravention of Regulation 358, R.R.O. 1990 of the *EPA* for an instrument created under subsection 27(1) of the *OWRA*;
- Undertaking of building expansions at the resort without septic approvals, in alleged contravention of section 30 and subsection 53(1) of the *OWRA* and s. 14 of the *EPA*; and
- Withdrawal of more than 50,000 L/day of water without a permit, in alleged contravention of s. 34(3) of the *OWRA*.

This application was one of seven *EBR* applications for investigation and review filed with the ECO by the applicants, Dr. John Brennan and a neighbour, in April and May 1999. The applicants lived on large rural properties adjacent to the resort. The ECO forwarded this application to the Ministry of the Environment (MOE). Other applications were forwarded to the Ministry of Natural Resources (MNR) and the Ministry of Municipal Affairs and Housing (MAH). This is the final application in this series for the ECO to review. Most of the applications were reviewed in the Supplement for the ECO's 1999/2000 annual report. One of the co-applicants, Dr. Brennan publicized his efforts on these applications on many occasions, launched a harm to a public resource lawsuit under the *EBR*, and in May 2001, issued a press release praising the efforts of MOE. (Thus, as is our normal practice with applicants who self-identify, we have identified the applicant by name in this review.) The press release also drew attention to the potential health risks of bacteria contained in effluent that were apparently being discharged in 1999 by the resort's malfunctioning and overburdened septic system.

Among the alleged contraventions described in the six other applications, the applicants alleged that the local municipality, Springwater Township, and the Nottawasaga Valley Conservation Authority (NVCA) appeared either unable or reluctant to regulate the alleged contravenor under the *Planning Act* and the *Conservation Authorities Act*. The applicants first raised concerns about Snow Valley's activities near the wetland with the NVCA in 1994.

In late 1994, at the insistence of the NVCA, an environmental consulting firm, SAAR Environmental, produced maps outlining the wetlands on the property and identified them as Provincially Significant (Class I to III). However, these maps apparently were never subsequently submitted to MNR for approval, official mapping and protection as a natural heritage area under the Provincial Policy Statement. In 1996, the Minesing Swamp was designated as an internationally significant wetland under the Ramsar Convention, an international body advocating protection of select wetland habitats around the world.

In December 1996, the owner of Snow Valley presented an engineering study to Springwater Township Council and its planning committee on proposed road locations at the site. The preferred new road was initially described by the resort owner as an "internal service road," intended to allow Snow Valley to expand its operations and establish a new recreational "tubing" facility. The property was subject to neither site plan control nor a secondary plan at the time the road plan application was filed by the resort owner, despite repeated pleas to the municipality from the NVCA and Dr. Brennan.

In May 1998, the applicants once again observed that extensive activities, including tree clearing and placement of fill, had been undertaken at the wetland site. While the NVCA had approved an expansion of a recreation trail on the site of the proposed road, it had not issued a permit to place fill in the wetland. The applicants stated that they asked the NVCA to investigate the May 1998 activities. The NVCA investigated and ultimately gave the alleged contravenor a permit to place fill at the site and in the wetland on July 15, 1998, thus appearing to some local residents as a retroactive approval of destruction of the wetland and construction of the road.

In late July 1998, the 'Snow Valley Working Group' ("working group") was set up by the Snow Valley Ski Resort, its land use planner, Springwater Township officials and the NVCA to develop a secondary plan for the area. The applicants alleged that this working group approved the plan for the disputed road shortly after it started its work. The working group presented a secondary plan to the township council in late August 1998. The applicants complained to the NVCA and Springwater Township on September 4, 1998, and officials for Springwater stated they were not aware of any road development on this site and no entrance permit for the road had been granted. However, in October 1998 officials for Springwater advised Snow Valley's owner verbally that an entrance permit would be granted shortly and he received notice in writing in November 1998. In the late fall of 1998, the township also held a public meeting on and approved the secondary plan for the area. According to the applicants, one effect of the 1998 municipal plan approval was that the "internal resort service road" became a municipal road servicing new development in the area.

Prior to filing this *EBR* application, and during the period that MOE was actively investigating the alleged contraventions, Dr. Brennan forwarded several letters to the Ministers of the Environment and Natural Resources. In a February 1999 letter to the then Minister of the Environment, the Honourable Norman Sterling, Dr. Brennan alleged: "From an environmental, moral and legal perspective, these breaches are of the most serious nature and pose immediate and long-term irreversible threats to the environment." He also noted in the same letter that the new road "appears to bisect a Class I Wetland, be in a High Archeological Potential Site location, and was then subject to a 'no development' restraint order from SCDHU due to nitrates and...a high water table." Dr. Brennan and one of his neighbours decided to file the *EBR* applications when, in their opinion, the minister failed to adequately respond to Dr. Brennan's February 1999 letter in a timely manner.

In September 1999, Dr. Brennan also took initial steps to commence a civil action relying on s. 84 under the *EBR*, alleging that the Snow Valley resort and its owner had caused harm to public resources such as the local stream and wetland when it undertook road construction and development. This action was not formally pursued in the courts after MOE agreed to take regulatory action to address some of the concerns raised by the applicants.

In 2000, the NVCA laid charges against the Snow Valley Ski Resort for alleged contraventions of the *Conservation Authorities Act* based on activities in the Minesing Swamp. MNR declined to investigate alleged contraventions of s. 35 of the *Fisheries Act* because the ministry announced in 1997 that it no longer enforced the fish habitat provisions of that Act. The ECO agreed with this decision in our review of the application published in the Supplement for our 1999/2000 annual report.

Ministry Response

MOE undertook the investigation. In a letter dated July 13, 1999, MOE indicated to the ECO and to the applicants that abatement staff in its Operations Division had completed a preliminary investigation, and had forwarded the matter to the Investigations and Enforcement Branch of MOE (IEB) for its consideration. MOE expected the investigation would be completed by July 22, 2000. Meanwhile, MOE noted that it had issued a Field Order under the *OWRA* to require certain work to be done to address some of the concerns raised in the application for investigation. MOE also said it might order further work, pending results from the initial Field Order. Preliminary MOE investigations in 1999 showed that a stream flowing into the wetland contained significant amounts of E. coli bacteria that were likely released by the inadequate septic system operating at the resort. In June 2000, MOE advised the ECO that Snow Valley management had carried out studies of groundwater impacts and had voluntarily applied for and received a s. 53 *OWRA* approval for a new sewage works and voluntarily agreed to a range of other abatement measures at the site. MOE also ordered the removal of Snow Valley's older, inadequate septic system.

In November 2000, MOE advised the applicants and the ECO that its IEB was still investigating the matter, and that the anticipated completion date was March 31, 2001. In April 2001, a Barrie TV station announced that MOE had laid charges with respect to a number of the alleged contraventions. However, ECO staff confirmed on May 17, 2001, that the IEB's investigation still had not been completed. In July 2002, ECO staff were advised that the IEB's investigation had been completed and that additional charges were laid on February 20, 2002. A trial was held in late 2002 and the charges were dismissed by the Provincial Court. The Crown appealed.

The Crown's appeal was allowed on November 10, 2004, and the court granted the Crown the right to commence a new trial. Upon re-screening the file the assigned Crown attorney decided that it was not in the public interest to proceed with a new trial and, on December 6, 2004, he asked that the charges be stayed pursuant to s. 32 of the *Provincial Offences Act*. The court granted this request.

ECO Comment

The ECO is pleased that this application for investigation resulted in abatement activities, a thorough investigation and laying of charges by MOE. The past five ECO annual reports have highlighted the lack of consistent enforcement of certain sections of the *EPA* and the *OWRA*. In particular, the ECO has frequently expressed concern with the evident low priority that MOE has given to prosecuting alleged contraventions of section 30 of the *OWRA* and section 14 of the *EPA* and promoting compliance with these two laws. MOE has a statutory duty to enforce all aspects of the *OWRA* and the *EPA*, including contraventions such as these sections, despite policies and procedures outlined in MOE's internal guide to Operations staff titled "Procedures for Responding to Pollution Incident Reports" (PRPIR). This guide, which was first published in 1997, was designed to allow MOE "to better deliver its mandate by focussing on larger and more environmentally significant problems." The policies and procedures in the PRPIR guide were part of a larger ministry Delivery Strategy which attempted to rationalize and prioritize MOE's services and its obligations to protect public health and the natural environment. The ECO remains concerned that smaller projects that may have significant cumulative environmental effects, such as the expansion of the Snow Valley operation in 1998 and 1999, may not always get sufficient attention from MOE abatement and enforcement officials if they strictly adhere to the PRPIR guide.

The ECO believes that this application demonstrates the usefulness of the rights provided to the public by the *EBR*. This application, and the six others filed by the applicants, served to highlight several planning and environmental issues in this rural township. It is unclear as to why the Crown made its decision to stay charges pursuant to s. 32 of the *Provincial Offences Act*. While the ECO does not review the exercise of discretion by lawyers working for the Ministry of the Attorney General, it is noteworthy that MOE's abatement activities in late 1999 and 2000 did significantly reduce the impact of the resort's development activities.

This application also raises troubling issues about compliance with the *EAA*. It is unclear whether MOE seriously investigated any of the alleged contraventions of the *EAA* that were described in this application. The applicants alleged that the Class Environmental Assessment for Municipal Roads (subsequently replaced by the Municipal Engineers Association Municipal Class EA approved in June 2000) was contravened and a Schedule C Class EA should have been undertaken by the developer and the municipality before the road project through the wetland was approved and built. The ECO believes that there is some evidence that MOE did not carry out an adequate investigation of the township's compliance with the Class EA for Municipal Roads. Indeed, in its letter to the applicants MOE failed to respond to any of the allegations related to possible contraventions of the *EAA*. MOE's reluctance to investigate compliance with the Class EA for Municipal Roads is consistent with monitoring and enforcement patterns for Class EAs described in the ECO's 2003/2004 annual report.

As we have noted in other annual reports, even if the wrong environmental planning process was followed, the limitation period for prosecutions for such an offence had expired because the alleged contravention took place at least eight months before this application was filed. Under the *Provincial Offences Act*, charges for an offence under the *EAA* must be laid within six months after the date upon which the offence was or is alleged to have been committed. Once again, this investigation highlights the inadequacy of this six-month limitation for prosecutions under the POA. The six-month limitation makes it very difficult to pursue applications for investigation under the *EBR*, especially when the ministry takes three years to complete an investigation, as it did in this case. Moreover, as noted in the ECO's 2003/2004 annual report, the combination of the six-month limitation period in the *EAA* and long MOE investigations can deprive applicants of their rights to launch private prosecutions, should MOE decide not to take action. As recommended by the ECO in previous annual reports and in the March 2005 report of the Minister's Environmental Assessment Advisory Panel (MEAAP), MOE should consider amending the *EAA* to provide a two-year statute of limitations.

MINISTRY OF NATURAL RESOURCES

Review of Application I2003010: Alleged Contravention of the *Fisheries Act* (MNR Returned the Application to the ECO)

Background/Summary of Issues

In February 2004, the applicants filed an application for investigation that was forwarded to the Ministry of Natural Resources (MNR), alleging a contravention of the federal *Fisheries Act*, specifically s. 35. The applicants are concerned about possible contamination from a landfill site at Lot 11, Concession 5, Cramahe Township.

The applicants also filed an application for investigation that was forwarded to the Ministry of the Environment (MOE) alleging contraventions of the *Environmental Protection Act* and the *Waste Management Act* (see pages 288-290 of this Supplement).

Ministry Response

MNR returned the application to the ECO, stating that alleged contraventions of the federal *Fisheries Act* do not fall under the jurisdiction of the ministry.

ECO Comment

The ECO concurs with MNR's decision to return this application. As of March 2004, MNR is no longer a lead agency in enforcing the federal *Fisheries Act*. The "Fish Habitat Compliance Protocol: 2004 Interim Measures" is a joint agreement between MNR, MOE, the Ministry of Agriculture and Food, Conservation Authorities, Fisheries and Oceans Canada, Environment Canada, and Parks Canada. This protocol will detail the responsibilities of each government agency and it will be reviewed by the ECO at a future date.

Review of Application I2004002: Alleged Contraventions of *LRIA* and *Fisheries Act* by McNabb Drain Development (Investigation Denied by MNR)

Background/Summary of Issues

The McNabb Drain is a constructed drainage system that was originally established in 1903 as an "Award Drain" under the *Ditches and Watercourses Act*, forerunner to the *Drainage Act* that has regulated the construction and maintenance of agricultural drains in Ontario since 1963. Located in Ramara Township in the northeast quarter of the Lake Simcoe drainage basin, the McNabb Drain watershed receives runoff from approximately 511 hectares of predominantly agricultural land. The watershed is fairly flat with grades of less than 0.1 per cent for the most part, but downstream of County Rd. 47 slopes increase to 0.8 per cent for the artificial drainage channel section. Below the confluence of the drain with the natural stream channel, the gradient increases to above 1 per cent.

The ECO received this application for investigation on April 5, 2004, and forwarded it to the Ministry of Natural Resources (MNR). In their *EBR* application, the applicants alleged that changes made to the McNabb Drain between 1997 and 2002 resulted in contraventions of the federal *Fisheries Act* ss. 35(1) and ss.36(3). The *Fisheries Act* ss. 35(1) prohibits any unauthorized work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat. Subsection 36(3) prohibits the discharge of a deleterious substance into water frequented by fish unless the deposits are of a type and concentration authorized by regulation. The applicants also allege contraventions of s. 16 of the *Lakes and Rivers Improvement Act*.

This application was also forwarded to the Ministry of the Environment (MOE) because the applicants identified a number of alleged contraventions of the *Ontario Water Resources Act (OWRA)* and the *Environmental Assessment Act (EAA)*. For a discussion of MOE's handling of these issues, the reader is referred to the review of application I2004001, pages 290-295 of this Supplement.

The issues referred to by the applicants relate to alterations in the drainage system for the McNabb Drain beginning in the late 1970s. During that period, a number of significant changes took place in the upper parts of the McNabb watershed, where land had been rezoned industrial by the township. Subsequent land use changes in this area included the establishment of a quarrying operation, and the construction of the Brechin Industrial Park beginning in 1986.

In spring 1998, flooding and damage occurred at a number of properties along the lower natural section of the stream, and very turbid discharges from the McNabb Drain were observed at the outlet to Lake Simcoe. Landowners linked these observations to work that had been done to address drainage problems on and near the industrial park in 1997. In that year, the industrial areas were graded, and a roadway and drainage ditches were constructed to service a new subdivision. Two property owners near the industrial area also initiated a contract to improve drainage for their properties and received some financial support from the Township of Ramara because the work also improved the drainage of the industrial park. The agreement to carry out this work was done in a manner similar to the provision for a "mutual agreement drain" under s. 2 of the *Drainage Act*, although the formal process specified under the *Drainage Act* was not followed. The original 1903 McNabb Award Drain was largely replaced and enlarged in this area during the course of the 1997 work. The applicants point out that the changes to the channel dimensions from those specified in the 1903 design made it necessary that the township obtain approval from MNR under s. 16 of the *LRIA*.

Between 1998 and 2002, erosion, flooding and sedimentation resulting from runoff and snowmelt events continued to be observed. The applicants submitted video footage showing large sediment loads in runoff from the mouth of the McNabb Drain to Lake Simcoe, which would potentially be harmful to fish. Frustrated by unsuccessful attempts to have these problems addressed by various government agencies, some of the affected landowners finally decided to take legal action. Two civil suits, seeking compensation for damages and remediation, were initiated at the Superior Court of Justice in the summer of 1999 by landowners. The suit named the Township of Ramara, Standard Industries, a number of landowners and a drainage contractor. In November 1999, the Superior Court Justice hearing the case invoked s. 120 of the *Drainage Act*, which allows for transference of matters from the civil courts to the jurisdiction of the Drainage Referee. All parties agreed to the court's consent order transferring the case.

In early 2000, the Drainage Referee ordered the Township of Ramara's Drainage Engineer to prepare a report that recommended an interim control plan to mitigate any further occurrences of damage and flooding during the spring freshet, and to remediate damages done to date. These included cleanout of the marina area at Point of Mara, enlargement of a road culvert, cleanout of existing on-line ponds, and construction of two small stormwater management ponds.

Also early in 2000, the Drainage Referee ordered the Township of Ramara to retain the services of an engineer to prepare a drainage report pursuant to s. 8 of the *Drainage Act*. The report was produced dated May 15, 2001, and was the subject of hearings over the next several months. In September 2002, the Township of Ramara awarded a contract to implement the McNabb Municipal Drain plan.

Based on the engineer's report of May 15, 2001, the construction of the McNabb Municipal Drain was initiated in September 2002. The new drain plan included several open drainage channel sections and two stormwater management ponds. One of these was designed to handle runoff from the Brechin Industrial Park and the other, located on the quarry property just downstream, was designed "to reduce flows from the lands east of Highway 12 to a level that the drain west of the highway could accept without substantial improvement." The applicants allege that natural wetland area and habitat loss for fish occurred as a result of construction of the stormwater management pond on the quarry site, in contravention of s. 35(1) of the *Fisheries Act*.

The construction of the McNabb Municipal Drain was not fully completed in 2002, and the applicants reported that severe erosion and sedimentation occurred during the 2003 spring runoff, damaging fish habitat downstream of the reconstructed drain sections and in Lake Simcoe near the outlet of the drain.

Ministry Response

In its response to the applicants, MNR made reference only to the applicants' allegations of contraventions of the *LRIA*. MNR did not respond to the alleged contraventions of the two subsections of the *Fisheries Act*. Under a protocol issued in 2004, rules were set out clarifying roles and responsibilities for the various federal and provincial agencies involved in enforcement of the *Fisheries Act*. Accordingly, MNR informed the ECO verbally that the issues raised by the applicants in connection with the *Fisheries Act* would need to be addressed by the Department of Fisheries and Oceans. (See pages 70-73 of the 2004/2005 annual report for further discussion of agency roles and responsibilities under the *Fisheries Act*.)

Regarding the alleged contraventions of s. 16 of the *LRIA*, MNR stated that their analysis of the application concluded "no approvals under section 16, or any other provisions, of the *Lakes and Rivers Improvement Act* were required for the works and/or activities carried out with respect to the McNabb Drain." MNR based this conclusion on clause 2(c) of O. Reg. 454/96 made under *LRIA*, which states that approval is required to "channelize a river or stream that may harmfully alter fish habitat or impede the movement of fish in a river, stream or lake, except for the installation or maintenance of a drain, subject to the *Drainage Act*."

The applicants were dissatisfied with the response from MNR and followed up with a series of communications. MNR responded in considerable detail to specific criticisms raised by the applicants, in two separate letters. One of the criticisms raised by the applicants was that ditch work done in 1997 to improve drainage from Brechin Industrial Park was unauthorized and not part of any drainage works under the *Drainage Act*. MNR responded that their staff had investigated in 1997 and determined that no contravention of the *LRIA* had occurred. Subsequently, the ditches referred to were considered by the Drainage Referee to be part of the McNabb Award Drain, hence exempt under the *LRIA*. MNR also considered that works subsequently ordered by the Drainage Referee for these ditches and other parts of the watercourse were properly part of the process under the *Drainage Act* and therefore also exempt.

ECO Comment

MNR's response and follow up letters to the applicants concerning the non-applicability of the *Lakes and Rivers Improvement Act* seem reasonable. In their pursuit of this *EBR* application and the related application (I2004001), the applicants have nevertheless brought to light weaknesses in Ontario's regulatory framework which allow profound effects on the water environment to occur when engineered drainage systems are implemented. The ECO believes that it is very difficult for ministries to protect water quality and preserve fish habitat whenever agricultural drains are initiated or maintained, given the exemptions under *LRIA* as well as under the *Environmental Assessment Act* and the *OWRA* for work carried out under the *Drainage Act*. Fish habitat and water quality of watercourses and lakes downstream of drainage schemes are frequently being written off when the statutory exemptions for drainage are allowed, and this has understandably led to dissatisfaction on the part of the McNabb Drain applicants, and to innumerable similar situations in Ontario.

Public action on the McNabb Drain issues resulted in years of proceedings ranging from civil court hearings to hearings before the Drainage Referee and more recently before the Environmental Review Tribunal (see I2004001). Landowners affected by decisions of these judicial bodies are still far from satisfied with the outcome to date. However, the *EBR* process did help bring about improvements to the final design of the McNabb Drain, through actions taken by MOE in the form of Directors Orders (see I2004001).

MNR's lack of written response on the alleged *Fisheries Act* contraventions highlights the current shortcomings of provincial oversight on this type of issue. Since early 2004, it has been impossible to file *EBR* investigations of *Fisheries Act* contraventions even though the *Fisheries Act* is listed as a prescribed Act in O. Reg. 73/94 under the *EBR*. The Protocol established in 2004 among the federal and provincial agencies involved in enforcement of the *Fisheries Act* (see page 71 of the 2004/2005 annual report) assigns the lead for enforcement activity on *Fisheries Act* contraventions to Environment Canada and DFO. Members of the public are unfortunately effectively barred from applying for *EBR* investigations of alleged *Fisheries Act* contraventions because the *EBR* only applies to prescribed Ontario ministries. This *EBR* application was one of the first to be affected by the 2004 Protocol.

Review of Application I2004008:
Alleged Contravention of *Conservation Authorities Act* s. 20(1) and O. Reg. 170 by a Conservation Authority
(Investigation Denied by MNR)

Background/Summary of Issues

The applicants allege that the Upper Thames River Conservation Authority (UTRCA) contravened s. 20(1) of the *Conservation Authorities Act (CAA)* and s. 4 and s. 5(1) to 5(3) of O. Reg. 170, which is the "Fill, Construction and Alteration to Waterways" regulation made under the *CAA* and specifically applying to the UTRCA.

The applicants state that these contraventions occurred in connection with a property which was developed on the Thames River floodplain and that the required permits were granted to the developer by the UTRCA without appropriate preliminary studies and assessment. The applicants cite numerous risks surrounding the property development in the floodplain.

The application was forwarded to the Ministry of Natural Resources on March 17, 2005.

Ministry Response

The Ministry of Natural Resources replied on April 18, 2005, stating that it would not be conducting an investigation. The ministry stated that it had considerable knowledge of this file from a previously submitted *EBR* application for review and from ongoing contact on this issue.

ECO Comment

The ECO will be reviewing this application during the 2005/2006 fiscal year and will present findings the next ECO annual report. This application relates to an application for review of the *Conservation Authorities Act* and Regulation 170, R.R.O. 1990 (Application R2003011), which was denied by MNR. See pages 269-271 of this annual report Supplement for details.

SECTION 7: *EBR* LEAVE TO APPEAL APPLICATIONS

EBR LEAVE TO APPEAL APPLICATIONS

April 1, 2004 to March 31, 2005 – Status as of June 30, 2005

Parties and Date of Leave Application	Description of Grounds for Leave to Appeal	Decision on Leave Application and Decision Date	Status/Final Outcome
Registry # IA01E1063 **Applicants:** Trent Talbot River Property Owners Association (TTRPOA); Marchand Lamarre and Jodi McIntosh; and Sandra Southwell **Ministry:** MOE **Proponent:** Stan McCarthy **Date application received by ECO:** November 8, 2002 **Instrument:** Permit to take water (PTTW), s. 34, *OWRA*	The applicants sought leave to appeal the decision to issue a PTTW to dewater a proposed quarry. The grounds for seeking leave included the following: the PTTW application contains conflicting estimates of the quarry's influence on the groundwater; the model submitted to the Director to estimate drawdown is based on four inaccuracies that underestimate the drawdown radius; and there was no consideration of the potential impact on significant surface water features such as the impact on springs, wetlands, or the Trent Canal.	The ERT granted the leave to appeal application of TTRPOA, Marchand Lamarre and Jodi McIntosh on the grounds that: the opinion of the Director "that the taking of water from the quarry would result in a drawdown of the water table in an area limited to the immediate surroundings of the site" is too conservative an interpretation of the data and modeling; the proposed quarry is located in a recharge area; and the vulnerability of local drilled wells to sulphurous and salty water emphasizes that there is potential for impacts on water quality as well as quantity. The ERT denied the leave to appeal application of Sandra Southwell based on insufficient evidence and because issuance of a PTTW is unrelated to the issuance of a certificate of approval for waste water discharge. **Date of leave decision:** January 8, 2003	**Appeal pending.** A hearing has been held and a decision is pending. This hearing was held concurrently with the related sewage works C of A hearing (see Registry # IA03E0893 below).
Registry # IA02E1174	The applicants sought leave to appeal the decision to issue a	The ERT granted this leave to appeal application on the grounds that: each of the	**Appeal pending.**

Parties and Date of Leave Application	Description of Grounds for Leave to Appeal	Decision on Leave Application and Decision Date	Status/Final Outcome
Applicants: Jessie Davidson; Mr. & Mrs. Garry Brewster; Mr. & Mrs. Russell Smith; Mr. & Mrs. Frank Weiner; and Mr. & Mrs. Fred Zinn **Ministry:** MOE **Proponent:** Aquafarms **Date application received by ECO:** May 9, 2003 **Instrument:** PTTW, s. 34, *OWRA*	PTTW to a commercial water bottler. The grounds for seeking leave included the following: the hydro-geological study was not required to include the cumulative effects on the water table of two large water taking plants situated in the same small watershed less than one mile apart; nor was the study required to establish the source of the water extracted from Aquafarms' wells; MOE has received complaints from at least 14 property owners within a few kilometres of Aquafarms stating that their wells have dried up; and one applicant's farm which is on the same wetland as the Aquafarms' wells lost the spring which fed a natural brook trout producing pond in the previous autumn.	applicants had an interest in the decision to issue the PTTW; and it was unreasonable to grant a PTTW when no sub-watershed groundwater study had been done and many wells and springs in the local areas have gone dry. The ERT was of the opinion that there was a real chance that the environment could sustain significant harm if a PTTW was granted. **Date of leave decision:** February 12, 2004	On October 4, 2004, the ERT received notice of the withdrawal of the Davidson, Weiner and Zinn appeals after these parties reached a settlement with MOE. On March 1, 2005, the ERT received notice of the withdrawal of the Smith appeal. A hearing has been held in the Brewster appeal and a decision is pending. On June 25, 2004, MOE filed notice of an application for judicial review of the ERT's decision to grant leave to appeal the PTTW on the basis that the ERT erred in law or exceeded its jurisdiction by misstating the test for leave to appeal in s. 41 of the *EBR*, and erring in its application of the leave test by: failing to appreciate the conjunctive nature of the test; failing to apply the appropriate evidentiary onus and burden of proof; making patently unreasonable factual findings; and granting leave on every individual ground without providing analysis or reasons. The application for judicial review is in progress.

Parties and Date of Leave Application	**Description of Grounds for Leave to Appeal**	**Decision on Leave Application and Decision Date**	**Status/Final Outcome**
Registry # IA02E1522 **Applicants:** Lynda Lukasik and Zen Matwiyiw **Ministry:** MOE **Proponent:** Hamilton Bio Conversion Inc. **Date application received by ECO:** November 6, 2003 **Instrument:** C of A, s. 27, *EPA*	The applicants sought leave to appeal the decision to issue a C of A for a waste processing site. The grounds for seeking leave included the following: the potential increase in nuisance odours because the type of waste processed by the facility is being changed from processing organic waste into animal feed, to processing sewage sludge into fertilizer pellets; it is not clear that the C of A will be amended to address increases to odour prior to the commencement of operations; the C of A has been issued in a "piecemeal approach" and will require intervention later; and clarification is needed as to how evaluation of the odour discharge will be conducted by MOE.	The ERT granted this leave to appeal application on the grounds that: the applicants had an interest in the decision; it would have been reasonable for the MOE to have considered possible amendments to the proponent's C of A for air discharges under s.9 of the *EPA* prior to approving the waste disposal site C of A; the applicants' concerns related to potential odour and contaminant emissions were not considered; there is significant potential for harm to the environment if the amendment to the C of A is granted; and the risk of fire or an explosion should be explored further. **Date of leave decision:** May 7, 2004	**Appeal allowed in part.** After the parties reached agreement on a settlement, the Environmental Review Tribunal allowed the appeal in part in accordance with the Minutes of Settlement on September 2, 2004. The Minutes of Settlement included conditions that: the proponent obtain approval for an amendment to its C of A (Air) before receiving and processing municipal biosolids at the site (this could include an odour limit and additional requirements such as stack testing and monitoring of air emissions from the waste processing site); the proponent and the operator of the facility not use the waste-processing site for the simultaneous processing of food waste and municipal biosolids; and before receiving any municipal biosolids at the site, the operator have in place, and fully train staff in, operational procedures to minimize occupational health and environmental concerns associated with municipal biosolids and dry pellets, including fire prevention and emergency response procedures.

Parties and Date of Leave Application	Description of Grounds for Leave to Appeal	Decision on Leave Application and Decision Date	Status/Final Outcome
Registry # IA03E0893 **Applicants:** Marchand Lamarre and Jodi McIntosh; and Trent Talbot River Property Owners Association **Ministry:** MOE **Proponent:** Thomas S. McCarthy & Barbara Ann McCarthy **Date application received by ECO:** December 2, 2003 **Instrument:** C of A, s. 53, *OWRA*	The applicants sought leave to appeal the decision to issue a C of A for sewage works for quarry de-watering. The grounds for seeking leave included the following: a prior C of A issued and subsequently revoked for this quarry included a condition to deal with the risk that normal operation of the quarry may result in discharges causing long-term contamination of the property, but the current C of A does not include this condition; there are several potential sources of contamination including fuels, lubricants and solvents that could be spilled, and dust control chemicals; and the minimum information requirements set out in the MOE's "Guide for Applying for Approval of Industrial Sewage Works" were not provided to the MOE Director.	The ERT granted this leave to appeal application in regard to the issue of quantity and quality of the water entering the quarry on the grounds that it was unreasonable and premature for the Director to issue a C of A for sewage works without a valid PTTW in place because it is impossible to know certain facts concerning the de-watering regime for the quarry, such as the volume of water involved. This raised the possibility that an approval for a sewage works could result in significant harm to the environment. The ERT expressed concern that the multiple proceedings related to this quarry application might result in fractured hearings concerning the PTTW and the sewage works C of A. The ERT suggested that in the future any hearings should be heard concurrently. **Date of leave decision:** January 29, 2004	**Appeal pending.** A hearing has been held and a decision is pending. This hearing was held concurrently with the related PTTW hearing (see Registry # IA01E1063 above). On March 12, 2004, MOE filed notice of an application for judicial review of the ERT's decision to grant leave to appeal the sewage works C of A on the basis that the ERT: failed to apply or incorrectly applied the leave test under the *EBR*; erred in law in finding that no valid PTTW was in place; erred in fact and made a patently unreasonable decision in finding that no one had any way of knowing whether certain facts were correct with the PTTW in place when there was ample evidence on which to consider the sewage works C of A; and gave vague reasons for its decision and did not provide sufficient notice to MOE or other parties to allow them to participate in the hearing in a

Parties and Date of Leave Application	**Description of Grounds for Leave to Appeal**	**Decision on Leave Application and Decision Date**	**Status/Final Outcome**
			meaningful way. The application for judicial review is in progress.
Registry # IA03E1836 **Applicant:** Roger Crawford, Township of Muskoka Lakes Ratepayers' Association **Ministry:** MOE **Proponent:** Rose (Ashton Resort) Corporation **Date application received by ECO:** May 25, 2004 **Instrument:** C of A, s. 53, *OWRA*	The applicant sought leave to appeal the decision to issue a C of A for sewage works allowing treated effluent to be discharged directly to Lake Muskoka. The grounds for seeking leave included the following: the risk to water quality since sanitary sewage effluent would now be discharged into the lake through a pipe on a continuous basis; and the risk that the content and/or concentration of sanitary sewage effluent might not be in compliance with the C of A due to system malfunction, human error or for other reasons, resulting in the discharge of raw sewage directly to the lake.	The ERT denied this leave to appeal application on the grounds that the applicant did not prove that no reasonable person would have approved the C of A. The ERT noted that the applicant failed to present any evidence that the issuance of the C of A could result in risks to human or ecological health. In addition, the ERT observed that the applicant's concern appeared to relate to developing new policy, which is not a matter for the ERT to address, rather than applying existing policy. **Date of leave decision:** July 29, 2004	**Leave to appeal denied.**
Registry # IA04E0468 **Applicant:** Lisa A.	The applicant sought leave to appeal the decision to issue a C of A to allow an enclosed	The ERT denied this leave to appeal application on the grounds that: the applicant failed to present convincing	**Leave to appeal denied.**

Parties and Date of Leave Application	Description of Grounds for Leave to Appeal	Decision on Leave Application and Decision Date	Status/Final Outcome
Sizeland-Ross **Ministry:** MOE **Proponent:** Material Resource Recovery S.R.B.P. Inc. **Date application received by ECO:** June 18, 2004 **Instrument:** C of A, s. 27, *EPA*	building to be used for the temporary storage and transfer of PCB soil, metal, wood and concrete. The grounds for seeking leave included the following: the decision-making process did not meet basic procedural fairness requirements; and MOE's refusal to acknowledge the implications of the construction of a high school in the immediate vicinity of the waste disposal site was unreasonable, as a significant increase in daily storage capacity presents a serious health and environmental threat.	evidence that the decision of the Director was unreasonable and could cause significant environmental harm; and since the amended C of A does not change the existing waste-handling and processing limits it is highly unlikely that any increase of the indoor storage facilities will create any of the dangers that the applicant has described **Date of leave decision:** August 16, 2004	
Registry # IA03E1380 **Applicant:** Waring's Creek Improvement Association and Safe Water Group of Prince Edward County	The applicant sought leave to appeal the decision to issue a PTTW for the taking of 1,091,040 litres per day for a maximum of 180 days per year to wash aggregates. The grounds for seeking leave included the following: the proponent has not explained	The ERT denied this leave to appeal application on the grounds that the applicants did not demonstrate that no reasonable person could have made the decision to issue the PTTW, nor did they prove that the decision could result in significant harm to the environment. The ERT concluded that the applicants did	**Leave to appeal denied.**

Parties and Date of Leave Application	**Description of Grounds for Leave to Appeal**	**Decision on Leave Application and Decision Date**	**Status/Final Outcome**
Ministry: MOE **Proponent:** Amos Earth Products **Date application received by ECO:** July 6, 2004 **Instrument:** PTTW, s. 34, *OWRA*	why it needs a permit for 1,091,040 litres per day when it has only required 7,000 litres per day in the past; there is no evidence that the Ministry applied an ecosystem approach; the proponent has ignored a requirement in the previous PTTW to check water levels daily in four neighbouring wells; and the proponent uses cattle and horses to control the vegetation on the berm surrounding its property, but there is no requirement to fence the holding pond to prevent contamination of the water.	not provide any strong expert or documentary evidence in support of their position, and that MOE conducted a thorough scientific review of the water-taking that showed it would have no significant impact on ground and surface water. Also, new monitoring conditions imposed by MOE would promote compliance with the permit conditions and provide an early warning of any possible impacts. **Date of leave decision:** August 31, 2004	
Registry # IA04E0729 **Applicant:** John Rocchi **Ministry:** MOE **Proponent:** Nexcycle Plastics Inc.	The applicant sought leave to appeal the decision to issue a C of A to process up to 33,000 litres per day of non-hazardous, containerized beverages. The grounds for seeking leave included the following: the C of A does not address the applicant's original concerns and includes	The ERT denied this leave to appeal application on the grounds that the applicant did not show that the C of A could cause significant environmental harm. The ERT found that the applicant had met the first part of the test for granting leave to appeal in s. 41 of the *EBR* since there was good reason to believe that no	**Leave to appeal denied.**

Parties and Date of Leave Application	**Description of Grounds for Leave to Appeal**	**Decision on Leave Application and Decision Date**	**Status/Final Outcome**
Date application received by ECO: August 10, 2004 **Instrument:** C of A, s. 27, *OWRA*	significant new waste processing activities which were not part of the original proposal nor subject to public comment; there was originally no mention of pallets of empty glass, plastic, aluminum or steel beverage containers being received on site; and the C of A does not include contingency plans for handling the waste received nor for the residual waste in the event of an equipment breakdown or other problem.	reasonable person having regard to the relevant law and to any government policies developed to guide decisions of that kind would have made the decision of the Director to issue this C of A without reposting a proposal on the Registry to provide an opportunity for the public to review and respond to the revised proposal. However, the ERT denied the application since the applicant failed to show that the Director's decision could result in significant harm to the environment thereby failing to satisfy the second part of the test for granting leave to appeal. **Date of leave decision:** October 8, 2004	
Registry # IA04E0868 **Applicant:** Jim Hasson **Ministry:** MOE **Proponent:** Terra International (Canada) Inc.	The applicant sought leave to appeal the decision to issue a PTTW for the taking of 228,940,992 litres per day for 5 – 10 years from the St. Clair River for process cooling, steam generation, air conditioning, utility water and fire water supply before being discharged back into the river. The grounds for seeking leave were that: the Director was	The ERT denied this leave to appeal application on the grounds that the applicant failed to present any evidence that the decision of the Director was unreasonable or could cause significant environmental harm. The ERT concluded that the PTTW allowed the taking of less than 0.1 per cent of the river's available flow and was therefore sustainable and would not affect other water users.	**Leave to appeal denied.**

Parties and Date of Leave Application	Description of Grounds for Leave to Appeal	Decision on Leave Application and Decision Date	Status/Final Outcome
Date application received by ECO: August 20, 2004 **Instrument:** PTTW, s. 34, *OWRA*	unaware of the risks that communities downstream of the St. Clair River facility are subjected to as a result of technical problems associated with once-through cooling systems; and once-through cooling systems are outdated technology that experience above-average rates of failure that risk the environmental health of the downstream residents and the ecosystem.	**Date of leave decision:** October 13, 2004	
Registry # IA04E0787 **Applicant:** Lacombe Waste Services **Ministry:** MOE **Proponent:** Waste Care Services Limited **Date application received by ECO:** January 19, 2005	The applicant sought leave to appeal the decision to issue a C of A for a waste transfer station. The grounds for seeking leave included the following: the amended certificate did not meet the conditions that are currently obligatory for most waste transfer station Cs of A in Ontario; the C of A indicates that operations at the site are to take place indoors but allows for outside storage of storage containers and a storage tank	The ERT denied this leave to appeal application on the grounds that: the applicant failed to present convincing evidence that the decision of the Director was unreasonable and could cause significant environmental harm; there was no foundation for the applicant's assertion that the Director's decision not to include the same or similar conditions in the proponent's C of A as its own was problematic; the applicant failed to demonstrate that the decision made by the Director to allow waste storage and tire derimming to take place outdoors could result in significant harm to the	**Leave to appeal denied.**

Parties and Date of Leave Application	**Description of Grounds for Leave to Appeal**	**Decision on Leave Application and Decision Date**	**Status/Final Outcome**
Instrument: C of A, s. 27, *OWRA*	which could result in significant harm to the environment; and the C of A requires periodic testing of incoming waste but should require testing of all incoming and outgoing waste.	environment; and no evidence was filed by the applicant to demonstrate that the monitoring and testing regime set out in the C of A was inadequate and could result in significant harm to the environment. **Date of leave decision:** March 21, 2005	
Registry # IA04E0887 **Applicants:** Haldimand Against Landfill Transfers (HALT) and Six Nations of the Grand River **Ministry:** MOE **Proponent:** Haldimand-Norfolk Sanitary Landfill Inc. **Date application received by ECO:** March 1, 2005	The applicant sought leave to appeal the decision to issue a C of A for a waste disposal site increasing the maximum daily fill rate from 10 tonnes of waste per day (domestic waste) to 500 tonnes of waste per day (9.07 tonnes per day domestic waste and 490.93 tonnes per day industrial, commercial and institutional waste). The grounds for seeking leave included the following: the proponent has provided no evidence to demonstrate that it has the experience or capability of operating a landfill that can receive up to 500 tonnes of waste per day, or of decommissioning a landfill	The ERT granted the leave to appeal applications on the grounds that: given the undisputed increase in truck traffic that will result from the increased fill rate, no reasonable person would leave to an open-ended post-approval condition the issue of the suitability of the road on which all landfill traffic will access the site; the C of A does not have a completion date for the study or a requirement that any upgrade to the road, if required, be done prior to acceptance of waste at the site; the Director's failure to consult with the Six Nations based on its assertion of aboriginal rights breaches the s. 41 leave test in the *EBR*; and the Director's decision could result in significant harm to the environment. **Date of leave decision:** June 21, 2005	**Appeal pending.**

Parties and Date of Leave Application	Description of Grounds for Leave to Appeal	Decision on Leave Application and Decision Date	Status/Final Outcome
Instrument: C of A, s. 27, *OWRA*	site containing a significant quantity of hazardous and liquid industrial waste; the proponent has failed to comply with conditions in the past; and the site is fundamentally unsuitable for use as a landfill.		

SECTION 8: *EBR* COURT ACTIONS

EBR COURT ACTIONS
April 1, 2004 to March 31, 2005

Parties and Date of Claim	**Description of Grounds for Claim**	**Status/Final Outcome**
Registry # CQ8E0001 **Plaintiffs:** Karl Braeker, Victoria Braeker, Paul Braeker and Percy James **Defendants:** Her Majesty the Queen in Right of Ontario, 999720 Ontario Limited, and Max Heinz Karge **Date statement of claim issued:** July 27, 1998 **Type of action:** Harm to a public resource action, s. 84, *EBR* **Court location:** Superior Court of Justice, Grey County (West Region)	The plaintiffs live next to property owned by the defendant Karge, located in Egremont Township in the County of Grey. The plaintiffs claim that the property is the site of an illegal waste dump and that substances emanating from the site are contaminating or will imminently contaminate the subsoil, groundwater, and surface water in the surrounding vicinity, including the plaintiffs' well water. They claim that the defendants are responsible for this contamination. The damages sought by the plaintiffs include: an injunction preventing the use of the property for any use other than rural uses; an environmental restoration plan to prevent, diminish or eliminate harm to a public resource caused by contaminants emanating from the waste dump and to restore the site to its prior condition; and damages in excess of one million dollars.	Action pending. Notice was approved by the court and placed on the Registry on December 23, 1999. As of June 2005, this matter is still going through various pre-trial procedures and has not been listed for trial at this point.

Parties and Date of Claim	Description of Grounds for Claim	Status/Final Outcome
Registry # CQ01E0001 **Plaintiff:** Wilfred Robert Pearson **Defendants:** Inco Limited, The Corporation of the City of Port Colborne, The Regional Municipality of Niagara, The District School Board of Niagara, and The Niagara Catholic District School Board **Date statement of claim issued:** 2001/03/26 **Type of action:** Public nuisance action, s. 103, *EBR* **Court location:** Superior Court of Justice, Welland	The plaintiff in this class proceeding maintains that the defendant has and does emit and discharge hazardous contaminants into the natural environment, including the air, water and soil of Port Colborne. The contaminants include oxidic, sulphidic and soluble inorganic nickel compounds, copper, cobalt, chlorine, arsenic and lead. The plaintiff claims that the defendant is liable for the activities at the refinery and the ongoing release of contaminants into the environment and onto the lands of the class members, based on the following causes of action: negligence; nuisance; public nuisance under s. 103 of the *EBR*; trespass; discharging contaminants with adverse effects under s. 14 of the *EPA*; and the doctrine of strict liability in *Rylands and Fletcher*. The plaintiff claims punitive and exemplary damages in the amount of $150 million, and compensatory damages in the amount of $600 million.	The certification motion was heard in June 2002. In a judgment dated July 15, 2002, the Ontario Superior Court of Justice dismissed the plaintiff's certification motion on the following grounds: the plaintiff failed to disclose a reasonable cause of action against the Region, the City or the Crown; there was no identifiable class; and a class proceeding is not the preferable procedure for resolving the issues found to be common among the class members. In September 2002, the Superior Court of Justice held the plaintiff liable for costs on the certification motion. The plaintiff and class members appealed this decision to the Divisional Court. In February 2004, the Divisional Court upheld the lower court's decision that it was not appropriate to certify this as a class action. In March 2004, MOE agreed to an undisclosed settlement with the plaintiff, leaving Inco as the only defendant in the lawsuit. On May 30, 2005, the Ontario Court of Appeal heard Pearson's appeal of the certification issue. A decision has not yet been issued. The ECO intervened in this appeal on the issue of liability for costs.

SECTION 9: STATUS OF ECO REQUESTS TO PRESCRIBE NEW LAWS, REGULATIONS AND INSTRUMENTS UNDER THE *EBR*

SECTION 9:
STATUS OF ECO REQUESTS TO PRESCRIBE NEW LAWS, REGULATIONS AND INSTRUMENTS UNDER THE *EBR*

One of the challenges facing the ECO and the Ontario government is keeping the *EBR* in sync with new laws and government initiatives. The ECO strives to ensure that the *EBR* remains up-to-date and relevant to Ontario residents who want to participate in environmental decision-making. The Commissioner and his staff constantly track legal and policy developments at the prescribed ministries and in the Ontario government as a whole, and encourage ministries to update the *EBR* regulations to include new laws and prescribe new government initiatives that are environmentally significant. (For further discussion of this issue, see "Keeping the *EBR* in Sync with New Laws," in the 2004/2005 annual report, pages 9-12.)

When the Ontario government passes and then proclaims a major new environmental law, the ECO reviews the law to determine whether it would be logical for the Ontario government to prescribe it for the purposes of the *EBR* and to ensure that Ontario residents are extended rights to participate in environmentally significant decision-making on proposed regulations and instruments issued under the new law. For example, certain new laws have sweeping implications for environmental planning, and there is strong public interest in participation in their implementation. Before the public can begin to participate in decisions to issue new regulations or instruments or request investigations and reviews, a new stand-alone law, such as the *Nutrient Management Act*, has to be added to the lists of prescribed laws set out in O. Reg. 73/94.

In some cases, a new law, such as the *Brownfield Statute Law Amendment Act, 2001 (BSLLA)*, amends existing environmental laws that are already prescribed. In these cases, the ECO may request that a ministry determine if any new environmentally significant instruments are created under the amended law and associated regulations, and if the ministry should consider amending O. Reg. 681/94, the *EBR* Instrument Classification Regulation.

If the new law is considered to be environmentally significant, the ECO then contacts the Deputy Minister of the ministry responsible and requests that the Act or certain parts of it be prescribed under the *EBR*. If the ministry agrees, it must then seek appropriate internal and central agency approvals and work with MOE, which is responsible for administering the *EBR* and its regulations, to ensure that appropriate amendments are made and that the proposed changes are posted on the Registry for public comment. Usually this process takes between one and two years. In some cases, the process can take much longer. For example, the Ministry of Agriculture and Food (OMAF) still has not posted a Registry proposal notice to prescribe the *Nutrient Management Act* under the *EBR* even though the ECO made its first request that it prescribe the *NMA* in the fall of 2001. (For further discussion, see the update on this issue in the Ministry Progress section of the 2004/2005 annual report, page 167.)

To illustrate the current status of various recent Acts and regulations, the ECO has prepared a summary in the table below. This table is merely an indication of the scope of the challenges faced, and is not intended to provide a comprehensive review. As indicated in the table, there have been serious delays in making certain laws subject to the *EBR*. The ECO is concerned about these lengthy delays because this means that the public is deprived of rights to participate in environmentally significant decisions, file leave to appeal applications and request *EBR* investigations and reviews. Moreover, the ECO is not legally empowered to subject ministry decision-making under these non-prescribed Acts to the same degree of scrutiny as would normally occur for decisions made under prescribed Acts.

Table: Status of ECO Requests to Prescribe New Laws, Regulations and Instruments under the *EBR* as of June 2005

Act, Regulation or Instrument (Ministry)	**ECO request to prescribe**	**Status as of July 2005 and ECO Comment**
Environmental Protection Act, Records of Site Condition Regulation (O. Reg. 153/04) (MOE)	ECO wrote to MOE in December 2004 requesting that it review O. Reg. 153/04 enacted under the *Brownfields Statute Law Amendment Act, 2001* to determine if Certificates of Property Use (CPUs) issued under O. Reg. 153/04 should be prescribed instruments under the *EBR*. This issue had been raised with the ECO by a stakeholder in October 2004.	To its credit, in early 2005 MOE undertook a review of all the instruments that could flow out of the use of sections of the *Brownfields Statute Law Amendment Act*, including CPUs. This MOE review work was still ongoing as of June 2005.
Food Safety and Quality Act, 2001 (FSQA) (OMAF)	ECO wrote to OMAF in late 2001 requesting that it prescribe the *FSQA* for the full range of rights including regulation proposal notices and applications for review and investigation under the *EBR*.	OMAF informed the ECO in June 2002 that it did not consider the *Food Safety and Quality Act* to have a significant impact on the environment, as the primary purpose of the Act is to provide for the safety and quality of food and the agricultural and aquatic commodities that become food. OMAF also stated that regulations regarding deadstock disposal would be split between the *Food Safety and Quality Act* and the *NMA* and that such regulations would be posted on the Registry. In July 2004 OMAF posted a new regulatory framework for deadstock, including repeal of the *Dead Animal Disposal Act* (*DADA*) and Regulation 263, RRO 1990 under the *DADA*.
Greenbelt Act, 2005 (MAH)	ECO wrote to MAH in April 2005 requesting that it prescribe the *Greenbelt Act* under the *EBR* for regulation and instrument proposal notices and applications for reviews.	In April 2005 MAH informed the ECO it will begin to work on the amendments required to prescribe the *Greenbelt Act* under the *EBR*.

Act, Regulation or Instrument (Ministry)	**ECO request to prescribe**	**Status as of July 2005 and ECO Comment**
Kawartha Highlands Signature Site Park Act, 2003 (KHSSA) (MNR)	ECO wrote to MNR in April 2005 requesting that it prescribe the *KHSSPA* under the *EBR* for review and investigation applications.	MNR advised the ECO by letter dated May 25, 2005, that MNR agrees that the *Kawartha Highlands Signature Site Park Act* should be prescribed under the EBR. MNR will work with MOE to do so once the *KHSSP*A is proclaimed in full and the park boundaries are regulated.
Lakes and Rivers Improvement Act (LRIA), Water Management Plans (WMPs) issued under s. 23.1 (MNR)	The *Reliable Energy and Consumer Protection Act* (AB02E6001) received Royal Assent in June 2002 and created s. 23.1 of the *LRIA*, which replaced s. 23 of the Act. In our 2002/2003 annual report, the ECO encouraged MNR to amend O. Reg. 681/94 to include WMPs issued under s. 23.1 as prescribed instruments.	Section 23 of the *LRIA* remains as a prescribed instrument under the *EBR* but it appears to be of little or no force and effect. MNR posted information notices for 18 WMPs during the reporting period. These notices should have been subject to public notice and comment under the *EBR*. (For additional information, see page 24 of this Supplement.)
Nutrient Management Act (NMA) (OMAF and MOE) Note: In late 2003, MOE assumed jurisdiction for enforcement of several aspects of the *NMA*.	ECO wrote to OMAF in late 2001 and again in 2002 and 2003 requesting that it prescribe the *NMA* under the *EBR* for regulation and instrument proposal notices and applications for review and investigation. The ECO has requested updates from OMAF each March since 2002.	In 2002, OMAF indicated that it needed more time to understand the implications of prescribing the Act under most sections of the *EBR*. Since then, neither OMAF nor MOE have publicly stated positions on prescribing the *NMA* for reviews, investigations and instrument proposal notices. As of June 2005, neither OMAF nor MOE had posted a proposal notice on the Registry on prescribing the *NMA*.
Oak Ridges Moraine Conservation Act, 2001 (ORMCA) (MAH)	ECO wrote to MAH in December 2001 requesting that it prescribe the *ORMCA* under the *EBR* for regulations and instrument proposal notices and applications for reviews. In early 2003 MAH staff briefed ECO staff on its plan to use information	MAH informed the ECO in early 2005 that it continues to work on the amendments to O. Reg. 73/94 that are required to prescribe the *ORMCA* under the *EBR*. MAH posted information notices for

Act, Regulation or Instrument (Ministry)	ECO request to prescribe	Status as of July 2005 and ECO Comment
	notices for official plan amendments (OPAs) related to *ORMCA* implementation rather than regular instruments.	13 OPAs related to the ORMCA during the reporting period. These notices should have been subject to public notice and comment under the *EBR*.
Ontario Energy Board Act (OEBA) (ENG)	In our 1998 annual report the ECO recommended that the *OEBA* be prescribed for regulation proposal notices and applications for reviews.	In 2003 the Ministry of Energy prescribed Clauses 88 (1) (a.1) to (g) of the *Ontario Energy Board Act, 1998* for the purposes of proposals for regulations and reviews under *EBR*. (See O. Reg. 104/03.) For ECO's review of the handling of this regulation, see the ECO's 2003/2004 annual report Supplement, pages 62-64.
Safe Drinking Water Act, 2002 (SDWA) (MOE)	In January 2003, ECO wrote to MOE requesting that it prescribe the *SDWA* for regulation proposal notices and for applications for review under the *EBR*. ECO staff also discussed this issue at numerous meetings between the ECO and the Environmental Bill of Rights Office of the MOE in 2003 and 2004. MOE contends that the *SDWA* should not be prescribed for *EBR* investigations because the *SDWA* has separate investigation provisions, as recommended by the Walkerton Inquiry. As of May 2005 MOE is finalizing a separate regulation on *SDWA* investigations that it first proposed in June 2003.	MOE prescribed the *SDWA* for regulations and reviews in the summer of 2003. The ECO agrees with MOE that *SDWA* should not be prescribed for *EBR* investigations. MOE also insists that it is not appropriate to prescribe *SDWA* instruments under the *EBR* because most *SDWA* approvals are exempted under the Municipal Class Environment Assessment on Roads and Water and Sewer Projects. This means that Ontario residents cannot file *EBR* applications for review related to *SDWA* instruments. This is an unfortunate result, and the ECO urges MOE to reconsider this limitation, which seems contrary to the spirit of the Walkerton Inquiry report.

Act, Regulation or Instrument (Ministry)	**ECO request to prescribe**	**Status as of July 2005 and ECO Comment**
Sustainable Water and Sewage System Act, 2002 (SWSSA) (MOE)	In January 2003, ECO wrote to MOE requesting that it prescribe the *SWSSA* for regulation proposal notices and for applications for review and investigation under the *EBR*.	MOE prescribed the *SWSSA* for regulations and reviews in the summer of 2003 (see O. Reg. 104/03). However, this Act has yet to be proclaimed because MOE has not yet developed any regulations under it.
Waste Diversion Act, 2002 (WDA) (MOE)	In July 2002, ECO wrote to MOE requesting that it prescribe the *WDA* for regulation proposal notices and for applications for review and investigation under the *EBR*. In May 2003 MOE staff briefed ECO staff on its position on prescribing the *WDA* and indicated that MOE did not believe that the *WDA* should be prescribed for investigations because the contravention section of the *WDA* is intended to support the collection of funds to support waste diversion activities by Waste Diversion Ontario.	In 2003, MOE amended O. Reg. 73/94 to require the ministry to post notices for proposed *WDA* regulations but Ontario residents are not permitted to file applications for review related to the *WDA*. (See O. Reg. 104/03.) In 2004, Ontario residents filed two applications for review related to prescribing materials for recycling under the *WDA*, and both reviews were rejected. The ECO believes that MOE should reconsider whether it would be worthwhile prescribing the *WDA* for *EBR* reviews.

SECTION 10

UNDECIDED PROPOSALS

SECTION 10: UNDECIDED PROPOSALS

As required by Section 58 of the *EBR*, the following are numbers of proposal notices posted on the Environmental Registry between April 1, 2004 and March 31, 2005 that were not decided by March 31, 2005. A detailed list is available from the ECO by special request.

	Policies	Acts	Regulations	Instruments
MOE	33	2	8	1,122
MNR	36	2	4	66
MEST	0	0	2	0
MTO	1	0	0	0
MAH	4	1	0	58
OMAF	1	0	0	0
TSSA	0	0	0	7
MNDM	0	0	0	2
MTR	2	0	0	0
MCCR	0	0	1	0
MC	1	0	0	0

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Darla Cameron	Policy & Decision Analyst
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